JAIL DESIGN AND OPERATION

and

THE CONSTITUTION

An Overview

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The views and opinions expressed in this paper are those of the author and do not necessarily represent those of the National Institute Of Corrections nor the United States Department of Justice.

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Introduction

The following pages contain a review of correctional law. A relatively new area of law, with its roots in the civil rights movement of the late 1960s and early 1970s, correctional law focuses primarily on the legal relations between inmates and those responsible for operating America's prisons and jails.

This paper reviews the history of correctional law. It begins with the first recognition that the Constitution truly protects inmates in jails and prisons to the continuing challenge of deciding what those constitutional protection mean in practice and the struggle at the facility level to assure that inmate rights are met.

One of the largest areas of court involvement with corrections is in the area of conditions of confinement. These types of cases, which frequently compel reduction of jail populations, can have a tremendous impact on facility design and operation and the cost of operating a jail. They can force change throughout the jail, which extends far into a county's entire criminal justice system. Many of the latter chapters in the paper discuss conditions cases. Other chapters highlight legal issues whose impact is primarily operational.

The reader of these pages may not remember all of the minute detail about "inmate rights," but should come away with an appreciation of the legal complexity of operating a "legal" jail in the waning years of the 20th Century.

Any jurisdiction involved in reviewing and planning for its jail and criminal justice system needs to recognize and take into account the requirements of jail design, construction, and operations imposed by the Constitution and enforced by the courts.

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I. Why In The World Did The Court Say That???

Courts respond to facts. If the facts in a particular case are shocking, then a startling result is likely. Much of the caselaw which has developed over the years is based on the extraordinary, the exception, rather than the norm. Where those shocking, exceptional facts come before a court, the court is likely to find a violation of the Constitution. The court in this exceptional case then announces a legal principle or precedent - an inmate right - to provide guidance in future cases and for other jail administrators. In addition to announcing the basic principle (such as "inmates have a right to be free from temperatures in the jail which endanger their health"), the court may also enter an order directing the defendants to take specific steps intended to correct the problem and to prevent its reoccurrence ("defendants are hereby ordered to install a cooling system which will be sufficient to maintain temperatures within a normal, non-threatening range," e.g., install air conditioning).

When one looks just at a relief order, it may appear that the court is being "soft on criminals" and ordering the jail to create a country club. When one looks at the facts behind the order, the end result may appear considerably more reasonable.

For instance, consider the case of Mr. Brock. Mr. Brock was a 62 year old man put in a Tennessee jail during a summer hot spell. Upon his arrival, he was in good health. He was not considered dangerous or violent. Upon his departure, Mr. Brock was unconscious, and would soon die. The jail had been criticized by state inspectors several times for its poor cooling and ventilation, among other problems. The sheriff had asked for funds to improve conditions, perhaps to install an air conditioning unit for the ducts already in place in the jail. But commissioners denied the request for budget reasons.

Temperatures during the days reached 110^{o}. Nighttime temperatures remained in the $103 - 104^{o}$ range. Humidity was very high, worsened by inmates running cold showers in attempts to cool the cell area.

A nurse's recommendations that a fan be put in front of Mr. Brock's cell was ignored, even though the sheriff knew Mr. Brock was having trouble breathing.

One night Mr. Brock became delirious. The officer on duty was notified by inmates, but he said he could no nothing because he was the only officer on duty. At 5 a.m., Mr. Brock

collapsed. He was eventually moved to a hallway but nearly two hours passed before he was finally taken to a hospital, without ever having been given first-aid by anyone in the jail. Diagnosed as suffering from heatstroke, Mr. Brock died several days later.

The court found that forcing a person to live in temperature conditions so extreme that they endangered his health was cruel and unusual punishment. The official "policy" of the county was one of deliberate indifference, as shown by the Commissioners' decision to do nothing about the heat problem. This supported a compensatory damage award of $100,000 against the sheriff and the county jointly. The court also made a $10,000 punitive damages award against the sheriff because despite knowing of the particular plight of Mr. Brock, the sheriff took no remedial measures (such as putting a fan in front of the cell) which would have cost nothing or very little. The court also awarded plaintiffs their attorneys' fees of an unspecified amount, ***Brock v. Warren County,*** 713 F. Supp. 238 (E.D. Tenn., 1989).

The Brock case was not a class action [1] and did not ask for any sort of prospective injunctive relief. However, had it been a class action and had it sought injunctive relief, the court would have had the power to require the county to cure the problem of excess heat in the jail in a way reasonably designed to prevent it from happening again. Especially since air conditioning ducts already had been installed, it is entirely possible that the court would have ordered the defendants to install air conditioning in the jail.

"Judge gives inmates air conditioning" the headlines would have read. More correctly, when the government incarcerates someone, the government has the obligation to hold the person in a setting which does not endanger the person's health, whether the danger come from excessive temperatures, poor food, bad sanitation, or other reasons. Given the defendants' refusal or inability to try to remedy the heating problem, the court would have the power to require steps to remedy the problem, steps which reasonably could include the installation of a cooling system adequate to maintain temperatures at levels which are not life threatening, e.g., air conditioning. The court also found that the commissioners and the sheriff had not given the officers any training in dealing with medical emergencies and that this showed deliberate indifference to Mr. Brock's serious medical needs, in violation of the Eighth Amendment. An injunctive order, bad one been entered, also could have addressed this deficiency in the jail's operation.

Brock is a classic example of how very poor conditions and practices, known to government officials, can create liability. officials in *Brock* were warned about the general problem and also knew that the heat problem was threatening Mr. Brock. Yet they did nothing. They did nothing to tram officers about medical emergencies. Mr. Brock's death could have been avoided with minimal expense. But it wasn't. The result was litigation which cost the

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1 "Class Action" A lawsuit brought on behalf of a large number of plaintiffs (a "class") with basically similar interests. In jail litigation, Class actions are commonly brought on behalf of all the inmates who are, have been, or may be in jail. Class actions void a multiplicity of individual claims.

defendants probably close to $200,000 when all the bills were in, and left them with a jail which still did not have an effective cooling system.

Brock then is an example of why a court may enter a remedial order which, seen in isolation, may seem extraordinary but when viewed in light of the facts of the case, is reasonable. These sorts of remedial orders, issued in the face of serious facts, tend to grow into "rights" which impact all jails.

So while sometimes a principle, stated in isolation, seems extraordinary; when one considers the factual situation from which that principle came, the result may become more understandable.

Facility Design Can Contribute To Liability

Several inmates sued as a result of being raped by other inmates. Various operational problems were cited by the court as contributing to liability. Physical factors in the prison's design also were noted and clearly made it more difficult for staff to monitor and detect improper sexual behavior. Officers stationed in central control bubbles monitored two person cells in 100 foot long, two story cell blocks. Officers were apparently rarely physically present in the cell areas. Once the door of a cell was shut, the officers in the bubble could not see into the cell. Microphones were placed at 25 foot intervals along the tiers, but not in the cells. To be heard, an inmate in a cell had to shout.

Despite the limitations the physical plant created, staff made little attempt to verify that inmates were in the proper cells.

So the physical plant of the institution, combined with an operational approach which did not try to compensate for the security problems created by the physical plant, led to a finding that institution officials were liable for the rapes which took place. Surprisingly, the jury awarded the inmates only nominal damages, *Buffer v. Dowd*, 979 F.2d 661(8th Cir., 1992). The case did not seek any sort of injunctive or prospective relief intended to prevent future rapes from occurring. Had injunctive relief been awarded, the injunction would have addressed the problems leading to the rapes. Thus, the order could have potentially addressed:

- ***Increasing the amount of supervision in the housing units in light of the double celling.***
- ***The ability of an inmate in a cell to contact staff in event of an emergency***
- ***The design of the facility which removed staff from direct contact with inmates.***

Facility design can enhance or detract from jail safety. But facility design alone cannot assure a safe jail. Staff interactions with inmates are critical to maintaining a safe jail. Double

bunking a jail compromises the facility design and the jail's ability to provide for the basic human needs of the inmates in several areas, but especially with regard to safety. Where staff isn't increased as the facility is double bunked, safety is compromised even more. A staffing level intended to adequately supervise a population of 250 inmates cannot be expected to provide the same level of supervision for 450 inmates. When facility design physically removes staff from direct contact with inmates, the problems of overcrowding only become greater.

When Court Says "Prison" Does it Mean "Jail?"

This paper is about jails, but it cites many court decisions about prisons. This is because almost all of what courts have said over the years about prisons applies to jails as well. Sometimes there are subtle differences between "jail law" and "prison law," but these are seldom significant. One example is in the area of conditions of confinement. Where inmates are held in a jail for only a short time, a court may not be as demanding with regard to conditions as it might be in evaluating a prison, where inmates might remain for years. However, since most jails hold at least some inmates up to a year or more, the differences between jail and prison law may be so slight as to be insignificant. Therefore, the reader may freely substitute "jail" in this paper wherever a reference is made to a court decision with a "prison."

II Time Was Once That . . .

- Inmates were intentionally segregated by race. *Lee v. Washington*, 390 U.S. 333 (1968).

- Inmate trusties could be given authority over other inmates, basic power to run prison, even deliver medical care, *Holt v. Sarver,* 309 F. Supp. 361 (ED. Ark., 1970), *Newmun v. Alabama,* 503 F.2d 1320 (5th Cir., 1974).

- A bedsore ridden quadriplegic, with wounds infested with maggots, could wait nearly three weeks between the time the maggots were discovered and his wound cleaned, *Newman.*

- Inmates might be confined in solitary confinement in 6' x 9' cells, with little natural light, for years and years, being allowed out of their cells for only 15 minutes per day. *Sinclair v. Henderson,* 331 F. Supp. 1123 (D. La., 1971).

- Inmates seen as particularly incorrigible might be housed in strip cells. Testimony showed they would be placed in the cell without clothing and that the front of the cell would be completely closed off from the corridor. The inmates were not given soap or any means

of cleaning themselves between the showers they were supposed to receive once every five days. Cells were often very dirty. Only a hole in a raised platform (an "Oriental toilet") was available. The inmate could not flush the toilet, but had to depend to staff to do this. Inmates might spend weeks or even months in these cells. Medical attention was sporadic. *Jordan v. Fitzharris,* 257 F. Supp. 674 (1966).

- Courts kept HANDS OFF correctional issues. Inmates were the "slaves of the state." There was little or nothing that courts would do to intervene in the case of prison or jail inmates.

THAT WAS THEN. Conditions, practices, and customs such as described above were brought to courts' attention by inmates and inmate advocates. These types of facts shocked the conscience of judges, convinced judges that no-one or nothing was holding jail and prison administrators accountable for the ways in which they ran their institutions. Beginning in the late 1960s, in light of many claims with similar sorts of appalling facts, the hand's off era ended and a period of "hand's on" involvement of the courts began.

Another factor contributing to courts paying attention to inmate claims, when previously they had largely ignored them, was the overall tenor of the times in the late 1960s. The civil rights movement was in full swing. Courts generally began to recognize that the meaning of the Constitution was not static, but that it changed with the times. Perhaps nothing symbolizes the evolutionary nature of the Constitution more than a statement from the Supreme Court in a 1958 decision where the Court said that the Eighth Amendment prohibits punishments which are incompatible with "the evolving standards of decency that mark the progress of amaturing society."[2] Although Trop was not a jail or prison case, the principle announced in that decision helped provide the motivation and reason for increased court scrutiny over corrections a decade later.

Since the late 1960s, courts have recognized if the government is going to operate a jail system, "it is going to have to be a system that is countenanced by the Constitution of the United States," *Holt v. Sarver,* 309 F. Supp., 362,385 (E.D. Ark., 1970). In other words, there is no iron curtain separating the inmate from the protection of the Constitution. The protection of the Constitution extends into correctional facilities, the only question being the extent of those protections.

As courts began, reluctantly, to examine conditions and practices in prisons and jails, there was no shortage of bad practices and conditions to examine. Those responsible for running institutions were not used to being held accountable to any authority other than their own, and certainly not to a federal judge.

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2 *Trop v. Dulles,* 356 U.S.86, 101 (1958).

Now, over 400 jails are under court orders relating to either crowding and/or conditions of confinement.

These totals don't count jails or prisons whose operating policies reflect an order of a court, e.g., concerning arrestee strip searches or types of publications an inmate may receive, or how an inmate may practice his/her religion, or inmate discipline, among many potential areas.

Conditions in America's jail and prisons no longer approach the horror stories which led to court intervention over 20 years ago. Although the courts have retreated from the extreme activism of the 1970s. court decisions and the threat of litigation still play a major role in the operation of a correctional facility.

III. History Of Court Involvement

How and why did it happen? How did the courts become so "enmeshed in the minutiae" of corrections, as Justice Rehnquist once wrote?[3]

To some degree, court involvement with correctional issues was probably inevitable as the civil rights movement in general reinforced the principle that no agency of government can, or should, remain beyond the reach and control of the Constitution. Where it is recognized that the Constitution provides limits on the power of an agency, the concept of separation of powers means that courts will exert some control, since courts enforce the Constitution.

But corrections did much to virtually invite court intervention. It is a cliche that "Power tends to corrupt, and absolute power corrupts absolutely" (Lord Acton) and ". . . where laws end, tyranny begins" (William Pitt). Those cliches proved true in many prison and jail environments in ways which created conditions and practices that cried out for outside intervention from someone. Those running prisons and jails had virtually absolute power over inmates. Many of those working in the field today can remember a time when corrections was out of control. It answered to virtually no-one and could do as it pleased. In many institutions, absolute power had corrupted, there was no law except the law of the warden and con boss, and tyranny flourished.

The facts of the early cases, such as described above, invited, if not demanded, that someone intervene to assure some level of humane treatment for inmates. No one is sent to jail to be raped or stabbed, or beaten by officers, or kept in a medieval dungeon under conditions which seriously threaten the person's health or sanity. Yet this is what was happening, across the country.

• 3 *Detention Reporter*. February. 1990

In 1991 the Supreme Court recognized that the "wanton and unnecessary infliction of pain" violates the Constitution, and that institutions must provide inmates with "the minimal measure of life's necessities".[4]

THE HANDS OFF ERA - PRE 1965-70.

Before the late 1960s, courts went out of their way to avoid deciding correctional cases in what has become known as the "hands off era." In one case decided in 1951, 40 inmates were housed in a single room 27 feet on a side in an old wood frame jail with only 20 bunks. Each inmate had less than 19 square feet of floor space (about the size of a single bed). There was no recreational capacity. Youths as young as 16 were housed in the jail, as were mentally disturbed inmates. There was only one toilet (often clogged) and one shower. Heat (and a major fire hazard) came from the old-fashioned coal burning stove located in the room. There was only one exit, and another exit could not have been added. The ventilation was very poor. The judge said the facility was not fit for human habitation, and quoted federal officials who called it a "fabulous obscenity."

But the judge felt he could do nothing about the poor conditions. Although he felt the conditions in the jail were "rightly to be deplored and condemned by all people with humane instincts," the conditions were still far better than those endured by soldiers fighting in "the mud and slush and snow and frost for hours or even days on end" in Korea. Besides, the only possible relief the judge could imagine was releasing the inmates, which he felt was not possible. The U.S. Marshal's Service, responsible for operating the jail, had no money for its improvement, *Ex Parte Pickens,* 101 F. Supp. 285 (D. Alas., 1951).

THE HANDS ON ERA - 1970 - 1980

Once the door to the courthouse opened for inmates, a stampede of cases battered the federal courts. Almost all of this legal activity took place in federal court, in large part because inmates and their advocates correctly believed federal courts were more receptive to "inmate rights" claims than state courts. The number of civil rights claims filed in federal court by state prisoners jumped from 2,030 in 1970 to 6,128 in 1975 and to nearly 12,400 by 1980.[5] Because correctional law was a completely new area of jurisprudence, there were few principles for evaluating cases. Defendants often had little but bristle and defiance to offer in defense of very bad practices. The result was a dramatic acceleration of rights and creation of new rights during the decade of the 1970s.

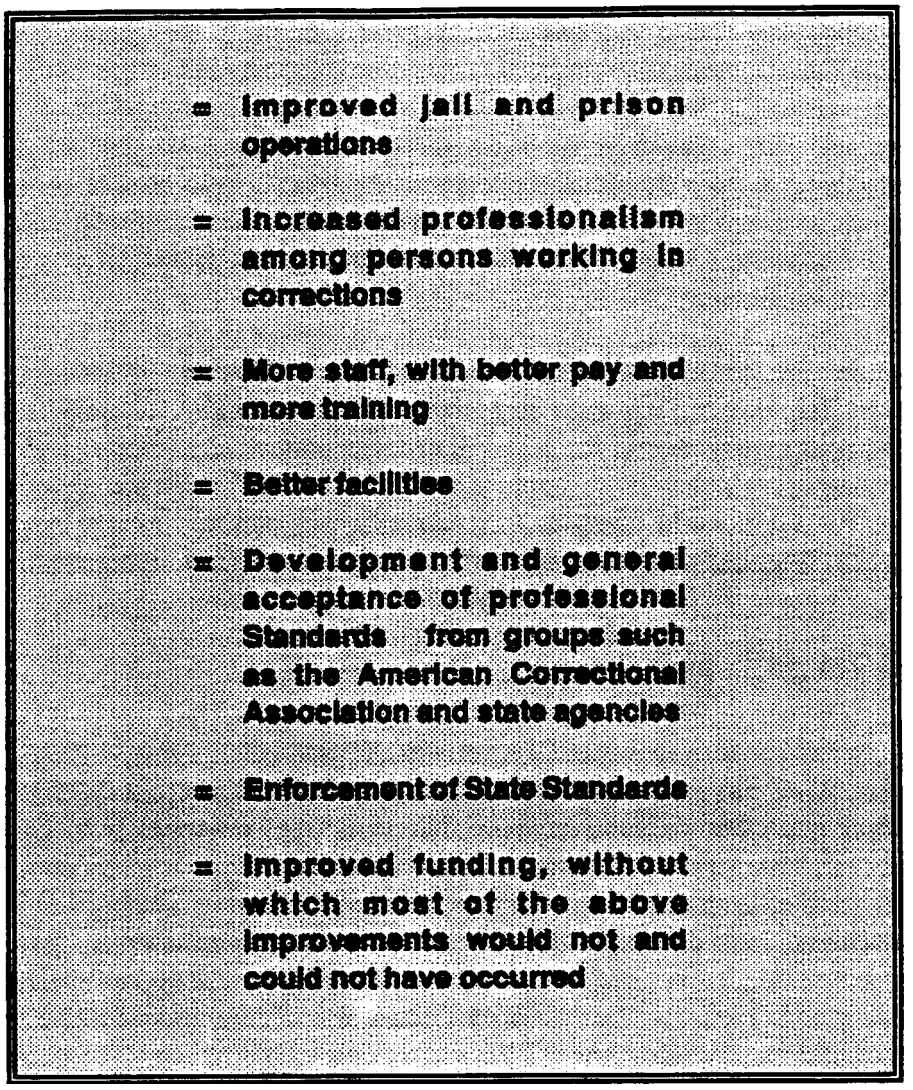
As an example of the growth of new rights, one district court judge ordered that inmates be given one green and one yellow vegetable every day. This decision was reversed on appeal, *Smith v. Sullivan,* 563 F.2d 373 (5th Cir., 1977).

•4 *Wilson v. Seiter*, 111 S. Ct. 2321 (1991).

•5 *Sourcebook of Criminal Justices Statistics*, 1983, Bureauu of Justice Statistics.

ONE HAND ON, ONE HAND OFF - 1980 TO DATE

The period of court involvement and activism peaked in 1979, with the Supreme Court's first double bunking decision, *Bell v. Wolfish,* 441 U.S. 520 (1979). Since that time, court involvement with correctional issues has retreated somewhat. This is due to several factors. A conservative Supreme Court which sent the clear message in several decisions that lower courts were going too far in defining and enforcing inmate rights.



But the ultimate motivator for the improvements, more than any other factor, was litigation or the threat of litigation: ***''If we don't (improve in some way) we'll get sued. "***

The history of corrections in the last third of the 20th century is, more than any other single thing, ***the history of court involvement.***

SCOPE OF COURT INVOLVEMENT: YOU NAME IT.'

There ate few areas of jail operation which have not been the subject of at least one (if not many) lawsuits over the years. Some of the issues which courts have addressed (with varying results) include:

- Inmate safety, classification
- Medical care, including quality of and access to
- Searches of inmates, visitors, and staff
- Religious practices - clothing, hair and beards, wearing of medallions, attending services, access to religious literature, "what is a religion," sincerity of beliefs
- Cross gender staffing: observation and searches of one sex by the other
- Diets, both medical and religious
- Access to or limitations of what inmates can read
- Access to the courts and legal materials
- Basic facility sanitation
- Personal hygiene, e.g., from toilet paper to toothbrushes to hot water
- Out of cell time and exercise
- Disciplinary sanctions and due process
- Administrative segregation: procedures for entry and conditions in segregation units
- Censorship of incoming and outgoing mail, handling of legal mail
- Diet and nutrition
- clothing
- Overall physical environment, including such things as lighting, heating, cooling, ventilation, noise levels
- Protection against suicide
- Use of force: when, how much
- Smoking and smoke-free jails
- Abortions
- HIV: disclosure, treatment, segregation
- Employee training and qualifications
- And so forth.

Progress in American corrections remains bolstered by the thousands of court decisions of the last 25 years which have touched nearly every aspect of jail operation. While the quality of jail management and operation is typically far more advanced than 20 years ago and the level of court intervention has declined somewhat in recent years, should a period of backsliding begin, the level of court intervention is likely to increase once again.

IV. Corrections and the Constitution in the 1990s

Certain principles must be recognized about jails, the courts, and the Constitution. While these principles may stir heated argument among government officials as they are applied in particular ways, the reality of the principles is no longer a subject for debate.

The Constitution protects inmates. Inmates have constitutional rights! "Prison walls do not form a barrier separating prison (or jail) inmates from the protection of the Constitution," *Turner v. Safley*, 107 S.Ct. 2254,2259 (1987).

Though specific interpretations of the Constitution have ebbed and flowed over the last 25 years, the principle that the *Constitution protects inmates* has not changed.

Officials are accountable and the federal courts will hold government officials and agencies accountable for knowing and meeting the obligations the Constitution imposes. And "lack of money" is seldom going to be accepted as an excuse for violating the rights of someone in jail.

When an elected or appointed official tells the federal court to "go to Hell" and ignores the court's order, it may provoke great media coverage and short term voter approval, but in the end, the court's *will prevail.* The "go to Hell" opposition will simply add to the taxpayer's bill and, if anything, increase the level of court intervention.

How will the voters react when they learn that "the federal judge has no business telling us how to run our jail and spend our money" may translate to "by unnecessarily fighting a lost cause, I am going to dramatically increase the size of the fee the county will have to pay to the inmates' lawyers and we'll get nothing of benefit in return?"

Correctional law then is a **FACT OF LIFE** for governments operating jails and the people who run those jails.

THE FUTURE OF CORRECTIONS AND THE COURTS

The conservative Supreme Court will shift back to the center. Courts may become less willing to defer to the judgment of correctional officials, unless clear rationales for their actions exist.

But until the courts become less conservative on correctional issues, agencies which feel that court pressure is subsiding may feel more comfortable in reducing correctional budgets. Where funding is decreased, the trend of growing correctional professionalism may be set back. Lack of funds may lead to more crowded jails, fewer staff, less training, decreased emphasis on self evaluation and improvement, the abandonment of state standards and their enforcement. If these things occur, serious problems in the operation of jails and prisons will reappear, and simply increase the likelihood of a resurgence of court involvement.

ADA - THE ISSUE OF THE 199OS?

A new area of legal involvement with both program and physical plant implications is the Americans With Disabilities Act of 1990. This new federal statute and accompanying regulations addresses government programs and services and the entire employment process. Its requirements go far beyond things such as building ramps and installing wheelchair lifts.

ADA's protection extends throughout the employment process, but also to participants or beneficiaries of government services and programs. Thus, it will protect inmates and visitors to the jail, as well as employees and job applicants.

The basic requirement of ADA is that persons with disabilities be reasonably accommodated so they can participate in employment or government services or programs.

The U.S. Constitution and courts of this country protect the rights of inmates. A jail cannot operate properly without recognizing this reality.

With passage of the ADA, inmates (along with many others) will now also enjoy the protection of this wide ranging federal statute, called by some the "Bill of Rights for the disabled."

V. The Constitution and Physical Plant

Understanding and complying with constitutional requirements is simply a rule of the game. And this rule has major impact in facility design. Here are at least some of the physical plant issues with potential constitutional significance which are relevant in either remodeling an existing facility or designing a new one.

- Crowding and capacities of physical plant (HVAC, plumbing, kitchen, etc.)
- Design can enhance or detract from safety - blind spots, staff access to inmates, staffing requirements dictated by the design.
- Exercise
- Medical and mental health services - what is in the jail, what is out? How should the jail handle the increasing number of mentally disturbed inmates?
- Heating, cooling, and ventilation

- Sanitation and hygiene; toilets, showers, etc.
- Life Safety Code
- The effect of design on staff relations with inmates. A direct supervision jail tends to create much better relations that earlier designs, which isolate staff from inmates.
- Privacy and cross gender supervision
- Library and law library
- Size/capacity of kitchen
- Disability access (ADA)

When conditions of confinement are reviewed under the constitution, the question is "what are the effects of the conditions on the inmates?" This makes it difficult, if not impossible, to say specifically what the minimum physical plant requirements of the Constitution are. Constitutional requirements aren't written down in one place, like the Building Code. Interpretation of basic principles can vary from one court to another, depending on the facts of a particular case. While one court may order "outdoor exercise one hour a day, five days a week," that order may be based on a unique set of facts which does not exist in another facility. So should the second facility allow the same level of exercise? Likewise, crowding may or may not produce very serious problems, depending on a variety of other factors, such as the quality of management and numbers of staff. So what are the constitutionally required minimum square footage requirements of a jail?

Another problem which can develop is a false sense of complacency due to a "we haven't been sued up to now, therefore we must be OK" philosophy. The risk is that you aren't OK, but only that no-one has sued the jail. Ignoring problems and letting them get worse only invites a larger lawsuit later. "Pay me now or pay me later."

Physical plant issues alone can sometimes be the focus of constitutional litigation. In other cases, physical plant and facility design issues can contribute to the operating success or failure of a jail.

VI. Understanding Section 1983 Lawsuits

Inmates file most of their lawsuits in federal court under a law passed by Congress during post-Civil War Reconstruction. That law appears as Title 42 of the United States Code, in Section 1983. Some understanding of "Sec. 1983 actions" may help foster an understanding of some of the important mechanics of civil rights litigation: who gets sued, and why, and what the court has the power to do.

Section 1983 reads as follows:

''Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Little used until the mid-portion of the 20th Century, Section 1983 became the legal vehicle by which persons could sue government officials for violations of constitutional rights. A Section 1983 action then is simply the way you get to court to raise a question of a constitutional violation.

Some of the key factors of Sec. 1983 include:

"Person" Neither the state nor state agencies are "persons" and therefore cannot be directly sued under Sec. 1983. But since 1978, "person" includes municipal corporations i.e., cities, counties, etc. Monell v. Department of Social Service, 98 S.Ct. 2018 (1978). So a County may be sued directly in Sec. 1983.

"Color of state law" - Virtually anything that government officials do in the jail will be "under color of state law." The private contractor who may operate a jail or provide a component jail service (such as medical care) will typically also be seen as acting under color of state law.

In 1988, the Supreme Court held that persons working under contract in a jail or prison, providing services which the government would otherwise have to provide (such as medical care) were acting under "color of state law".[6]

"Causation" The plaintiff must prove the defendant(s) "caused" the violation of a constitutional right. Concepts of causation can become very important when the suit names the County or the Sheriff or Chief Jail Administrator and they were not directly involved in the incident which the suit is about (such as the improper use of force).

Violations can be "caused" by a policy, custom, or practice of the agency and it is by showing this that the County can become liable. For example: The jail is seriously overcrowded. As a result of crowding and understaffing, violence levels rise dramatically. The sheriff asks the County Commissioners for funds to increase staffing and/or to build a new jail, but is rebuffed: "We have no money, you will just have to make do." The county's "policy" then is to run an overcrowded, excessively violent jail. A new, young inmate is raped and stabbed when housed with a predatory homosexual. The victim may be able to sue the county for his

-6 *West v Atkins.* 108 S. Ct. 2250 (1988)

damages. *Redman v. County of San Diego,* 942 F.2d 1435 (9th Cir., 1991) is a case with facts similar to this example.

Inadequate training or supervision can be basis for suits against persons, even the County, not actually present when the act which violated the inmate's rights occurred, when the training or supervision is so bad as to reflect "deliberate indifference" to the constitutional interests of the inmate. Thus, where it is known to a "moral certainty" that officers will be dealing with the constitutional rights of inmates (such as in using force, inmate discipline, conducting searches, etc.) and the training is seriously inadequate, the County could be held liable for failure to ***train, City of Canton v. Harris,*** 109 S.Ct. 1197 (1989).

THE COURT'S RELIEF POWERS

What can the court do when it finds a constitutional violation? Section 1983 gives the court a variety of relief powers. The most important are damages and injunctive relief.

DAMAGES:

Damages are of three sorts:

Nominal damages are a token amount (such as $1.00) where the plaintiff shows a violations of his/her rights but can prove no actual damage;

Compensatory damages are intended to make the plaintiff whole again, and include out of pocket expenses, medical costs, and the more subjective concept of pain and suffering; and

Punitive damages are intended to punish the defendant and deter others from similar conduct.

Punitive damages historically are reserved for only the most egregious conduct by defendants, but are theoretically available in any Sec. 1983 case where "deliberate indifference" is part of the constitutional violation, *Hill v. Marshall,* 962 F.2d 1209 (6th Cir., 1992).

The qualified immunity defense. Damages may be awarded against individual defendants in a Sec. 1983 action only if the right which was violated was "clearly established." This protects government officials, such as a correctional officer or jail administrator, from being monetarily liable for failing to predict the future course of constitutional law. However the "qualified immunity" defense is not available to government agencies, such as counties.[7]

•7 **Qualified immunity: In Section 1983 actions, no damages may be awarded to a plaintiff who establishes that his/her constitutional rights were violated if the right was not "clearly established." The defendent must plead that any rights violated were not clearly established. This claim, if successful, is known as "qualified immunity." This defense is not available to municipal corporations, only to indidvidual government officials.**

Lawyers and judges may spend large amounts of time arguing about whether a right is "clearly established." Many inmate rights are "clearly established," but in many other cases, the facts of the case are important. For instance, there is a general right to exercise for inmates, but deprivation of access to exercise is permissible for limited periods of time. It is not clear how long this time may be.

HOW SERIOUS CAN DAMAGES BE?

- A mildly retarded, mildly mentally ill inmate received $65,000 damages as a result of being held in jail improperly for just under four months because the jail failed to note the inmate had not been given his first court appearance. The inmate's lawyer was given $35,000 in attorneys' fees, *Oviatt by and through Waugh v. Pearce,* 954 F.2d 1470 (9th Cir., 1992).

- $18,000 to an inmate found guilty of being involved in riot, where evidence showed that the inmate was present in dining hall during disturbance, but no evidence showed he had actually participated in the disturbance. The sanction had been one year in Special Housing, *Zavaro* v. Coughlin, 970 F.2d 1148 (2d Cir., 1992).

- $1.1 million in a suicide case, *Simmons v. City of Philadelphia,* 947 F.2d 1042 (3rd Cir., 1992).

- $6.1 million to a nurse who acquired the HIV virus in a fracas with au inmate, where officers refused to come to aid of several nurses struggling with the inmate, Doe v. ***State of New York,*** 595 NYS 2d 592 (1993). This was a tort suit, alleging negligence, not a Sec. 1983 civil rights action.

Injunctive relief

The injunction is the vehicle courts use to correct what are perceived as continuing problems. An injunction is the most common relief in class actions involving jails. Injunctions respond to past and present problems, but focus on the future. What must be done to correct this problem and prevent its reoccurrence?

An injunction may either order that a practice be stopped or can demand affirmative steps by the defendants.

Having found a constitutional violation (or violations) AND having decided there is a continuing problem, the court may enter an order requiring the defendant to correct the problem by addressing its cause. For instance:

Constitutional problem:

Excess levels of violence.

Cause of problem: Gross overcrowding, causing the breakdown of the classification system. An additional cause might be inadequate staffing.

Cure: A population cap and population reduction order. Another possible order would be to increase staffing levels.

Impact: Compliance with a population reduction order affects the entire criminal justice system, from police to prosecutors to courts to the jail since all of these agencies help determine who comes to jail and how long they stay there. The attempts to comply with the population reduction order triggers internal disputes between various stakeholders in system (prosecutors, judges, jail, etc.), as none want to change their practices in order to relieve jail crowding problems.

Relief orders will start at the least intrusive level needed to bring facility up to constitutional levels, *Stone v. San Francisco,* 968 F.2d 850 (9th Cir., 1992). But if defendants don't comply with the relief order, more court orders are entered which become ever more intrusive, ever more demanding.

The principle to remember about the court's relief power is that the **Court has the power necessary to require defendants to correct the problems.** The amount of power used grows in direct proportion to the court's view of defendants' inability or reluctance to remedy the problem.

While specific orders can be appealed as being abuse of discretion, fighting the order outside the context of the appeal if counterproductive, will add costs to the case, invite more, not less, court intervention, prolong the case, and make the plaintiffs' lawyers wealthy.

ATTORNEYS FEES

There is another important cost factor in Sec. 1983 actions. Another federal law, 42 USC Sec. 1997, allows the "prevailing party" in a civil rights case to be awarded attorneys' fees.[8]

"Prevail" includes more than winning the lawsuit after a trial. Wig only a portion of the case will support a fee award. Settling the case through a consent decree supports a fee award, making the fee a proper question in settlement negotiations. Even where the lawsuit becomes a "catalyst" for improvements, courts have awarded fees.

Case law favors giving plaintiffs attorneys' fees awards, to encourage lawyers to represent plaintiffs in vindicating civil rights violations. Inmates who represent themselves in civil rights cases and who win are not entitled to attorneys' fee.

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[8] It is very difficult for defendants to "prevail" for attorneys' fees purposes - case must be "frivolous." So most attorneys' fees issues deal with whether the plaintiff "prevailed." Since attorneys' fees are awarded against the party (not the party's lawyer), fee awards against inmates would have little monetary value, since inmates seldom have any money.

Fees are computed by multiplying the hours the lawyer spent on the winning portions of the case tunes the hourly rate charged by similar lawyers in the community. This produces the "lodestar" fee figure, which may be adjusted slightly up or down depending upon circumstances. In a big case, with hundreds or thousands of hours, and rates sometimes exceeding $200/hour, this formula can produce fees of six or even seven figures.

The size of fee is not necessarily limited by size of award, although after a 1993 Supreme Court decision, a nominal damage award of $1.00 will no longer support a fee award, *Farrar v. Hobby,* 113 S.Ct. 56 (1992)[9].

Fighting a case every step of the way, from complaint through discovery, through trial and appeal, and on into the relief phase of big case may only drive up the attorneys' fees of the plaintiff, which the defendants will pay.

One other point about attorneys' fees is that they may not be covered by a county's insurance coverage! Where a county's coverage pays for "damages" from "errors and omissions," it did not cover attorneys' fees, *Sullivan County, TN v. Home Indemnity Co.,* 925 F.2d 152 (6th **Cir., 1992).**

The potential size of attorneys' fees is a one more factor to consider when lawyer and government client formulate their strategy in a civil rights case.

- **Section 1983 is a very broad law, giving the federal courts wide powers. Liability under Section 1983 can attach to both individuals and to local government entities, such as counties.**

VII. Inmate Rights What are the issues?

Major areas of constitutional rights for inmates come from four constitutional amendments.

- First Amendment: To what extent may inmates exercise their rights of religion, speech, press, and in general, the right to communicate with persons outside the jail? What justifies restricting those rights?

- Fourth Amendment: What types of searches are reasonable/unreasonable for inmates, visitors, and staff? What privacy protection do persons retain when upon entering the jail?

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[9] This decision will lessen the possible attorney's fees liability exposure for counties to some degree and discourage lawyers from filing civil rights cases where there are no clear damages. If an injunction is awarded "lodestar" hours times rate of attorney's fees is proper even if no damages are given.

- Eighth Amendment: What conduct, such as the use of force, and/or conditions amount to cruel and unusual punishment?

- Fourteenth Amendment: Due process and equal protection:

What types of procedural steps (notice, hearing, etc.) must accompany the decision to discipline an inmate to better assure the decision is made fairly?

- What other types of decisions require some form of due process, and what form must that process take?

- **Due process** also protects/regulates conditions of confinement for pretrial detainees, who are not protected by the cruel and unusual punishment clause of the Eighth Amendment. The reasons for this are technical, 'legal" ones, irrelevant to this discussion. The requirements of the 8th and 14th Amendments in this context are essentially the same.

- **Access to the courts:** what are the institution's affirmative obligations to assist inmates in preparing legal papers? This is both an operational and resource/physical plant issue, which is often overlooked at the jail level.

- **Equal protection:** are there legitimate reasons for treating different groups of inmates differently? For example: what justifies providing programs and facilities for women inmates which are typically of lesser quality and quantity than programs and facilities provided for men ("parity")? The courts which have examined this question have consistently found no adequate justification for such differences, *McCoy v. Nevada Department Of Prisons,* 776 F. Supp. 521 (D. Nev., 1991).

This short summary of the potential constitutional issues in running a jail belies the complexity of those issues. **A** complete review of the issues would take volumes.

VIII. How Courts Evaluate Claims - The Balancing Test

Many rights enjoyed by persons in the community are restricted, sometimes eliminated altogether, by the fact of incarceration. The questions are how much may a particular right be restricted. and for what reasons.

Many inmate rights claims require balancing what the inmate asks for ("the right to practice my religion by wearing religious medallions") against a competing interest of the institution, which is most commonly security ("medallions could be used as weapons or as gang identifiers, therefore, we do not allow medallions in the jail").

How courts pre-set the balance scale - what comparative weight they give constitutional rights in general versus the weight they give the jail's concerns about maintaining security - can often dictate the end result.

In past years, some courts pre-set the balance strongly in favor of any constitutionally protected right, especially First Amendment rights (religion, speech, press). To justify any restriction of such rights, the institution had to show a "compelling interest." This was a hard burden to meet.

The balancing test now has eased considerably in favor of the institution, with the court's giving considerable deference to concerns of the jail administrator.

"When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests," *Turner v. Safley*, 107 S.Ct. 2254 (1987).

"Legitimate penological interests" include security, order, safety, rehabilitation (for convicted persons), and perhaps equal opportunity.

Whether there is a reasonable relationship between a restriction and a legitimate penological interest is determined through a four part test:

1. *The connection between the restriction and the legitimate interest of the institution, e.g., why does not allowing inmates to keep and wear religious medallions further the security and safety of the jail?*

2. *What other alternatives exist for the inmate to exercise the constitutional right at issue? If medallions are not allowed, can the inmate attend religious services, meet with religious leaders, have access to religious reading materials, etc.*

3. *If the inmate's request is allowed, what would the impact be on staff, inmates, and institution resources?*

4. *Are there "ready alternatives" which would satisfy both the interests of the inmate and the concerns of the institution?*

In general, the *"Turner Test"* is not a difficult one to meet, but the jail administrator still must remember:

- When does a restriction potentially impinge ***on*** a constitutionally protected area? It helps if the administrator stays abreast of general developments in the law. While expert legal advice would be useful, such advice is often not available for most jail administrators. Most county attorneys offices are (a) too busy to give frequent advice, and (b) not very knowledgeable about correctional law because they do not have the time to become well versed in what is an important, but admittedly arcane, area of law.

- What in fact are the reasons behind a particular restriction, and do they *really* further legitimate penological interests?

For instance, restrictions on "radical" or "dirty" publications are appropriate for some material. However, sometimes the sheriff makes a decision based on moral or political philosophy, rather than on a "legitimate penological interest." Just because someone wouldn't have a publication in one's home doesn't mean that it can be banned from a jail.

Likewise, it is also easy to exaggerate a possible security threat. Several years ago, the uniform practice in jails was to strip search everyone at the time of booking, regardless of who the arrestee was, what the arrest was for, or the behavior of the arrestee. The ostensible reason for this practice was to prevent the introduction of drugs or weapons into the jail which had not been discovered through routine pat searches. In a series of lawsuits around the country, no jail was able to convince a court that persons arrested for minor offenses such as unpaid traffic tickets or other misdemeanors was likely to be carrying contraband around in a body cavity, *Weber v. Dell,* 804 F.2d 796 (2d Cir., 1986), cert denied 483 U.S. 1020. The *Weber* opinion cites ten decisions from seven other federal circuits in support of its position.

With the *Turner* test, the Supreme Court gave jail administrators a comparatively clear roadmap for analyzing their actions and defending many of the claims inmates bring. However, unless the administrator is aware of when his/her actions intrude into an area protected by the Constitution and unless the administrator can articulate legitimate reasons for such actions, the potential benefits of the *Turner* decision may be lost.

IX. The First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .'' U.S. Constitution, Amendment I.

Common issues under the First Amendment include religious questions and censorship or rejection of publications and correspondence (with special attention to "legal mail" from courts, lawyers, and government officials), To a lesser extent other issues around communications between inmates and free people arise, including telephone and visiting, but these have not been litigated often.

Most issues here are "balancing test" questions which involve day to day operational issues. Here is sampler of issues: (Note: these are issues which have been raised - "who wins" varies").

Religion : Several different issues have arisen around religion.

Practice issues are probably the most common. They include attending religious services (for instance, when temporarily segregated), wearing religious clothing or medallions, ability to keep long hair or beard, access to religious reading material (for instance, when jail staff feel

the material is racist or otherwise likely to stir unrest in jail), participation in special ceremonies (Ramadan, sweat lodge), religious diets, etc.

Other religious issues include:

- What is a religion? A witchcraft sect? Satanism? The Universal Life Church (send in $10 and receive doctor of Divinity degree in return mail), Rastafarians, other sects/cults which claim religious protection? This very complicated issue at times must be addressed. If a group claiming special privileges or accommodations because of their religious status is not in fact a religion, the institution is under no obligation to make any accommodations.

- Sincerity of belief if an inmate is not sincere in his/her religious beliefs, there is no duty to try to accommodate the inmate's special demands. Showing a lack of sincerity may be difficult.

- Equality of opportunity to practice (especially for small religious groups).

- Expenditure of government funds (paying for chaplains).

- Correspondence;: when may incoming or outgoing mail be read and censored/rejected? Must postage be provided? Writing materials? How rapidly must mail be delivered? What special precautions must be taken for "legal mail" from lawyers, courts, or other government officials? What due process procedures must be followed when a letter is rejected?

- Publications: what type of content justifies not allowing a publication into a jail'? Personal taste of the jail administrator is not an acceptable reason for not allowing a publication, a fact which can sometimes create controversy around sexually oriented publications. A particularly difficult issue arises around publications which are religious but which may also be racist.

- Visiting: what restrictions may be placed on visiting/visitors'? Are contact or conjugal visits required? (The answer is "no" to both. Neither are constitutionally required but contact visits are very common and a small, but increasing number of state institutions allow conjugal visiting.) Interestingly, courts have been slow to intervene with regard to visiting.

Most of the issues which arise under the First Amendment will be decided by the *Turner* balancing test. Some of the issues which arise can be very complex. The key to the jail

defending decisions involving the First Amendment is to have well thought out reasons behind the decisions. Snap decisions often can be difficult to defend.

X. The Fourth Amendment

'The right of the people** to **be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ." U.S. Constitution, Amendment IV

Searches, from pats to probes

The Fourth Amendment protects a person's reasonable expectations of privacy by prohibiting the government from conducting "unreasonable" searches and seizures. What a "reasonable" search is varies, depending on the intrusiveness of the search and why the government needs to conduct the search. Jail, by definition, reduces the "expectation of privacy" of all entering, including inmates, visitors, and staff. The question in many lawsuits is how much the expectation of privacy is lowered or, conversely, how intrusive a search may be in jail, given the government's heightened need for security.

Arrestee strip searches present a classic example of a unique jail search issue. Several years ago, standard practice was to strip search everyone booked into the jail, regardless of reason for arrest or actual suspicion the person might be carrying contraband. The practice was attacked in lawsuits around the country.

Almost without exception, federal appeals courts held the practice violated the Fourth Amendment. The government could not show a sufficient threat of contraband, undetectable in a pat search, entering the jail on the person of individuals arrested for things such as unpaid parking tickets, or for other minor offenses sufficient to justify the dramatic privacy intrusion which goes along with a strip search. The rule which emerged was that "reasonable suspicion" had to exist before such searches could be done. Reasonable suspicion could be based on reason for arrest (drug offenses, felonies or at least violent felonies), person's current behavior, or perhaps past arrest record, *Weber v. Dell,* 804 F.2d 796 (2d Cir., 1986).

Other major search issues, past and present, include:

Cross Gender Supervision. What privacy related limitations exist with regard to one sex supervising/observing&U searching the opposite sex?

This issue is unresolved. Some case law supports female officers pat searching male inmates and tolerates "casual, incidental" observation of male inmates showering, using toilet, or changing clothes. Probably very few posts or tasks exist in a male facility which women could not fill. There is not corresponding case law regarding male officers and female inmates. A 1993 decision said males pat searching woman was cruel and unusual punishment, a violation of Eighth Amendment, *Jordan v. Gardner,* 986 F.2d 1521(9th Cir., 1993). Judicial

uncertainty about this issue reflects society's difficulties in reaching a consensus on the relations between the sexes in the workplace and society at large.

This issue has implications for facility design. By putting up various types of privacy screens around showers and toilets, the jail can eliminate many of the "invasion of privacy" complaints inmates may have.

Cross gender supervision presents a three-sided conflict, instead of the typical two-sided dispute between the interests of the inmate and of the institution. Now inmate privacy and institutional security needs must be weighed along with the equal opportunity rights of employees.

Many jail administrators speak very highly about female correctional officers, use them virtually everywhere, for nearly every task, with few reservations. Except for tasks involving quite intense scrutiny of male inmates in the nude, it is doubtful a jail post today could be justified as "male only." The Courts *probably* would be more protective of privacy of female inmates, but there is not enough caselaw to make strong statement on this issue.

Urine testing. May inmates or staff be subjected to random mine tests? (Now, "yes" for inmates, "probably yes" for staff, at least when they work in direct contact with inmates.) This issue was litigated many times when urine testing first became common.

Cell Searches. Must the jail have specific justifications for conducting cell searches and do inmates have right to be present during cell searches? The Supreme Court said no "cause" was required for cell searches, and the inmate had no right to be present, *Block v. Rutherford,* 104 S.Ct. 3227 (1984).

Strip searches. Could inmates be strip searched without particularized cause after contact visits or other trips outside the secure perimeter of the jail? Yes, *Bell v. Wolfish,* 441 U.S. 520 (1979). Questions remain as to whether inmates in the general population of a jail or prison may be strip searched without some level of cause, such as "reasonable suspicion."

Body cavity searches. What level of "cause" must exist before an inmate may be required to submit to a body cavity probe search? (Reasonable suspicion, although many jurisdictions prefer to use the slightly more demanding standard of "probable cause.").

How searches are conducted. How staff conduct searches is often important. A generally reasonable type of search may violate the Fourth Amendment if done unreasonably, so as to unnecessarily humiliate or degrade the inmate. The cell search which leaves the cell in shambles or the strip search which unnecessarily exposes the inmate to observation by others are examples of this.

Searches of visitors and staff. In general, each has more privacy protection than inmates, but less than they would have on the street.

Although issues around inmate privacy and cross gender super&ion remain unresolved, the fundamental constitutional requirements for most jail search issues are well established. One of the major continuing problems is assuring that these fundamental rules are followed on a day to day basis.

XI. The Eighth Amendment

". . . nor cruel and unusual punishments inflicted," U.S. Constitution, Amendment VIII.

"Cruel and unusual punishment" is a vague, subjective concept now commonly defined in the jail context as the "wanton and unnecessary infliction of pain." [10] Previous court attempts to define cruel and unusual punishment have included such phrases as "shock the conscience of the court" or "violate the evolving standards of decency of a civilized society. [11] The Eighth Amendment has had greater impact on jail operations than other Amendments because conditions of confinement are subject to Eighth Amendment scrutiny. [12] It is through this Amendment that courts enter sweeping orders which may require such things as population caps, release of inmates, improvements to the jail's physical plant, and other costly and dramatic changes.

Use of Force

The most common Eighth Amendment claim does not involve such sweeping institutional reform. It is through the Eighth Amendment that courts will evaluate the use of force. Here are the claims of the officer beating the inmate. Jail staff are permitted to use force in many circumstances, including the protection of themselves or others, protection of property, enforcement of orders, and maintaining jail safety and security. But force, if excessive enough, violates the Eighth Amendment: Force becomes cruel and unusual punishment when it involves "the wanton and unnecessary infliction of pain," *Hudson v. McMillian*, 112 S.Ct. 995 (1992).

In deciding whether force meets this standard, the Supreme Court said lower courts should consider several factors:

- The need for the use of any force;
- The amount of force actually used;

•10 *Hudson v. McMillian*, 112 S. Ct. 995 (1992).

•11 *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). *Jordon v. Fitzharris*, 257 F. Supp 674, 679 (N.D. Cal. 1966).

•12 Technically, the Eighth Amendment does not apply to or protect pretrial detainees. However, the Due Process Clause of the Fourteenth Amendment provides essentially equivalent protections for this group; which may make up 50% or more of a jail's population. For ease of reference, this paper will lump Eighth and Fourteenth Amendment issues together and refer to them only as Eighth Amendment, except where otherwise noted.

- The extent of any injuries sustained by the inmate;
- The threat perceived by the reasonable correctional official; and
- Efforts made to temper the use of force.

It is not hard for a legitimate use of force (such as an officer responding to an attack by an inmate) to cross the line and become an impermissible form of punishment, especially when an officer loses his/her temper in a struggle with an inmate. Therefore, training and supervision are of great importance in avoiding excess force problems. Officers need to understand WHEN force is appropriate, WHAT types of force to use, HOW TO use them properly, and HOW MUCH force is enough. Courts will not second guess most uses of force too closely, but the officer who doesn't know "when to say when" may be a lawsuit waiting to happen.

Knowing how to accomplish a necessary goal (such as removing a disturbed and violent inmate from a cell) without using force is a vital skill for a correctional officer. Sometimes overlooked, training officers in the use of interpersonal skills to help them defuse potential force situations without resorting to force can avoid potential litigation and, more importantly, enhance the safety of both officers and inmates. Poor verbal and interpersonal skills can add to the natural antagonism between officers and inmates and thus tend to provoke potentially physical confrontations.

In addition to training in use of force, close supervisory review of uses of force is very important in assuring that force is used properly.

Other major Eighth Amendment issues include medical care and conditions of confinement. These topics are reviewed in detail in the following chapters.

Force cases usually involve only a few individuals and arise from a single incident. However, frequent uses of force in a jail may be an indicator of larger problems. Facility design and the operating philosophy dictated by that design can also affect staff-inmate relationships and have an impact on the number of force situations which arise in the jail.

Good training, good supervision, and well written reports can be useful in defending force claims. Many institutions now routinely video tape force incidents whenever feasible. Many say the taping not only provides good evidence in court, but can deter inmates from provoking force incidents and can deter staff from using excessive force.

XII. Medical Care

The quality and quantity of medical care remains one of the most common subjects of inmate lawsuits. As with most inmate Litigation, the great majority of such suits are resolved in favor of the defendant correctional administrators and medical staff. However, many decisions over the years favor inmates. These have had a significant effect on the nature of medical care provided in correctional facilities and have put a hefty price on inadequate medical care.

Some early medical cases involved the following types of situations:

- Medical care for an 1800 man prison is provided by one doctor and several inmate assistants in a substandard hospital. *Gates v. Collier*, 501 F.2d 1291 (5th Cir., 1975).

- An inmate's ear is cut off in a fight. The inmate retrieves the ear, hastens to the prison hospital, and asks the doctor to sew the ear back on. Medical staff, it is alleged, look at the inmate, tell him "you don't need your ear," and toss the ear in the trash *Williams v. Vincent*, 508 F.2d 541 (26 Cir., 1974).

- Medical services are withheld by prison staff as punishment. Treatments, including minor surgery, are performed by unsupervised inmates. Supplies are in short supply and few trained medical staff are available in a prison the court terms "barbarous." Twenty days pass before any action is taken for a maggot infested wound, festering from an unchanged dressing, *Newman v. Alabama*, 503 F.2d 1320 (5th Cir., 1974).

- Inmate "tier bosses" are used to screen medical requests in a jail, *Johnson v. Lurk*, 365 F. Supp. 289 (E.D. Mo., 1973)

The barbaric issues of the early cases rarely arise in medical cases in the 1990s. But some old issues repeat themselves and new issues continue to develop. AIDS presents many complex legal and operational issues. The dramatic upsurge of tuberculosis, especially new drug-resistant strains of TB, creates problems of screening, testing, and protection for both staff and inmates, since TB bacteria are airborne.

Getting Medical Cases To Court. Issues around inadequate medical care can be presented to courts through two different legal vehicles: tort cases brought in state court and civil rights actions brought under 42 USC Sec. 1983, which can be brought in either federal or state court.

Inmates, like any other recipient of medical services, can sue providers of care for malpractice in a tort suit. Such suits attempt to show the provider was in some way negligent in the care

provided, i.e., that the care failed to meet a reasonable standard of care as measured by prevailing medical practice in the community.

Tort suits seek only damages as relief and typically focus on individual conduct. Relatively few inmates present their medical claims to the courts through tort actions.

By far the preferred means of suing over institutional medical care is the Section 1983 claim. If medical care is so poor as to be cruel and unusual punishment, the plaintiff may be entitled to damages, to injunctive relief, to declaratory relief, and to attorneys' fees (which may far exceed the actual value of the judgment won by the plaintiff). Since the "typical" inmate medical lawsuit is a civil rights suit, the balance of this chapter will focus on constitutional issues and medical care.

The Constitution and Medical Care

The Supreme Court decided its first inmate medical case in 1976, announcing a test for evaluating the constitutional adequacy of jail and prison medical care which remains in place today:

We therefore conclude that *deliberate indifference to serious medical needs* of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment, *Estelle v. Gamble*, 429 U.S. 97,105 (emphasis added).

In reaching its conclusion, the Court emphasized that the inmate must rely on the government to treat his medical needs since the fact of incarceration prevents the inmate from obtaining his/her own treatment: "if the authorities fail (to treat medical needs), those needs will not be met. In the worst cases, such a failure may actually produce physical torture or a lingering death," 420 U.S. at 103.

The test from *Estelle* is not an easy one for an inmate to meet. In *Estelle*, the Court made it clear that "deliberate indifference" requires more than a showing of simple negligence - medical malpractice does not violate the Constitution. In subsequent cases, the Court has moved the definition of deliberate indifference to somewhere beyond even gross negligence. In very simple terms, "oops" in medical care does not violate the Constitution (although it may be a tort). But "who gives a damn" probably does violate the Constitution.

Individual Cases

The ear case mentioned in the beginning of this chapter is an example of individual litigation. Other examples include an institution's refusal to change an inmate's job assignment after being advised the assignment aggravated allergies the inmate suffered from, *McDaniel v. Rhodes*, 512 F.Supp. 117 S.D. Ohio, 1981. Delay (or refusal) in providing prescribed medical treatment has been the subject of numerous cases. Often the underlying problem is a conflict between concerns of the institution's custody staff and the medical staff. Custody staff may override a doctor's order for some form of treatment out of a fear that the treatment will

threaten security. For instance, crutches given an inmate returning to a cell block could be used as weapons by the inmate or other inmates. Other times budgetary needs may cause the delayed treatment.

Suicides:

Lawsuits following suicides are common and have resulted in major damage awards against jails and jail staff. The issues in a suicide case often arise around

- identification of possible suicidal inmates;
- protecting/monitoring them, once identified; and
- responding to suicide attempts.

Proactive efforts to prevent suicides in jails through such things as improved screening at booking can be very successful and can be implemented with a minimal cost.

Systems Cases

At the risk of oversimplification, it is easy to state the fundamental questions in a medical systems case:

T I M E L Y...

Access: May any inmate who feels he/she has a medical problem obtain timely access *("timely"* varying with the nature of the medical problem) to. . .

Qualified Staff: Are the staff providing medical care qualified? Are they practicing within the scope and limitations of their license? And do these staff provide. . .

Diagnosis: Equipped with adequate resources for diagnosis and treatment and, at least where a "serious medical need" exists *("serious"* is also a debatable term), does the inmate receive treatment and appropriate care, in a timely fashion?

It is one thing to develop a medical system of Access - Diagnosis - Treatment for readily treatable short term medical problems. It is something else again to meet treatment demands which may be very expensive and are of indefinite duration. Although most inmates are in and out of the jail in a matter of days or a couple of weeks, some may remain well over a year. Many of these long-term inmates have serious medical problems, either of a chronic or acute nature. The costs of treating these problems may be huge. Yet delaying or denying treatment to save money places the jail at grave liability risk.

There are many factors which may be evaluated when the adequacy of an entire medical service delivery system is attacked. Here are some of the more common factors which courts have reviewed in this type of litigation:

- *Intake screening - (this is particularly important in the jail setting, where there are a disproportionate number of suicide attempts within the first few hours after admission)*
- *Adequate numbers ofproperly qualified medical staff - (including dental and mental health staff)*

Medical records

- Adequacy of the physical plant (Note that this may include questions about what is available both for physical and mental illnesses)
- Sanitation
- Access to medical staff, i.e., the sick call system
- Emergency response systems
- Overall policies and procedures
- Special diets
- Training
- Medications and medication delivery systems
- Delayed or denied treatment (a very real problem with budget shortages)

In short, every part of a medical service delivery system is subject to review in a case which claims the medical system is deliberately indifferent to the medical needs of the inmates. Inquiries will begin with intake medical screening for new arrivals at the jail and will continue through the most elaborate medical procedures.

Non-medical staff important

Medical litigation is not limited to acts or omissions of medical staff or the adequacy of the medical department. Issues often can arise from the actions of custody staff.

- *The sick call system will often depend on custody staff conveying the written (or sometimes oral) requests for medical care to the medical department.*

- *Custody staff may be responsible for escorting inmates to the medical department and for treatment which is given outside the confines of the institution.*
- *Custody staff is in a position to impede or facilitate access to medical staff in emergency situations, e.g., the inmate with an emergency in the middle of the night depends on custody staff forward a requestfor help to medical personnel.*
- *Custody staff may be in a position to impede or even prevent prescribed treatment from being delivered, such as ignoring a medical order for bed rest or light duty for an inmate and instead requiring the inmate to resume a strenuous work load.*

Conflicts between competing interests and concerns of custody and medical departments are not uncommon in a prison or jail. It is essential that mechanisms exist which allow a thoughtful resolution of such disagreements quickly enough to prevent harm to the inmate from delayed or denied care or treatment.

Consider the following situation, which is a classic example of the medical-custody conflict:

> *..an inmate injures his arm in some way. A doctor at the jail sees the inmate and orders that he be taken to a local hospital for additional treatment. The doctor directs that the inmate's arm be kept elevated during transport. The transportation lieutenant notes that institution policy requires all inmates being moved outside the facility be moved in shackles. Following this policy to the letter, the lieutenant orders the inmate shackled and overrules the doctor's order about keeping the inmate's arm elevated. Should the arm injury be worsened as a result of not being elevated during the movement, the inmate would have an excellent claim for deliberate indifference to his serious medical needs. The claim would name the Lieutenant. It might also name the facility head or even the County for being responsible for the policy the Lieutenant followed.*

What is a Serious Medical Need? What is Deliberate Indifference?

Unfortunately, court decisions do not provide a "bright line" between "serious" and "non-serious" medical needs. Courts also have given somewhat vague guidance as to what amounts to "deliberate indifference." The Ninth Circuit in 1992 offered some discussion of both of these judgmental terms in the case of *McGuckin v. Smith,* 974 F.2d 1050 (9th Cir., 1992).

Determining if a need is "serious" may involve consideration of various factors. Will a delay in treatment result in further significant injury or the "wanton and unnecessary infliction of pain?" Is the injury one which "a reasonable doctor or patient would find important and worthy of comment or treatment?" Does the condition significantly affect the person's daily activities? Is there "chronic and substantial pain." *McGuckin v. Smith,* 974 F.2d at 1060?

Turning to deliberate indifference, the court said that a simple accident cannot be deliberate indifference. But where there is a "purposeful act or failure to act," deliberate indifference is shown.

Delaying treatment does not show deliberate indifference, unless the delay is harmful. Harm, said the court, could be shown from continuing pain, not just that the conditioned worsened. Budget limitations may often create strong pressure to delay expensive treatment, but any time treatment is delayed, doctors should evaluate the medical consequences of that delay.

In *McGuckin,* over three years passed between an injury to the inmate's back and corrective surgery. Even after the surgery was recommended, several months elapsed. The plaintiff was in pain during the entire time in question. No-one offered an explanation to justify the delay between diagnosis and treatment. The court's opinion was clearly ready to find an Eighth Amendment violation except it turned out that the plaintiff sued the wrong people.

There are no serious arguments against the principle that inmates should receive adequate medical care. However, the realities of limited budgets, overcrowded facilities, and the high inmate demand for medical services (often for comparatively minor concerns or from simple malingering) guarantees that not every demand will be met as quickly as might be desired or sometimes even met at all. And with such prioritization born of necessity comes the potential for litigation.

Medical Issues of the 1990s

Perhaps the simplest way to predict what the main legal issues in correctional medicine will be in the next decade is to ask what the main medical problems will be. If an operational problem exists, it is safe to assume it may wind up in court. Here are some likely candidates for lawsuits:

Adequacy of Systems.

As long as crowding remains the dominant problem in jails, suits over the adequacy of medical service delivery systems will continue. Increases in medical staff which match increases in the inmate population may reduce liability exposure. Unfortunately, such staffing increases often do not occur. Even where they do, population increases may outstrip the physical plant's capacity to meet the needs - there simply aren't enough examination rooms, infirmary beds, etc.

Increases in population also increase the likelihood of individual claims as more and more inmates drop through the ever-widening cracks created by too many inmates and not enough money, staff, and resources.

In addition to systems claims driven by overcrowding will be systems claims brought on behalf of inmates with chronic medical and/or mental health problems.

Mental Health Care.

Mental health needs of inmates are subject to the same "deliberate indifference to serious medical needs" test as are physical medical problems. The numbers of mentally ill inmates

in jails continues to climb, increasing the demand on treatment resources. Many jail administrators across the country complain of the difficulty in obtaining mental health treatment for an inmate from the traditional mental health system. The mentally ill offender in the jail can be a danger to him/herself, to staff, to others, and in danger from others. Consistent with both the safety and treatment needs of this group, separate housing for them must often be provided. The result is the creation of small mental hospitals within the jail. This creates both a physical plant issue for the jail as well as challenging staffing issues relating to both treatment and custodial staff.

AIDS.

The number of inmates with AIDS will continue to increase and bring a number of potential legal issues, many of which are already being litigated.

Disclosure: who is entitled to know the HIV status of an inmate? Is there liability exposure for not disclosing? For disclosing to the wrong person? Disclosure issues may come from inmates (who already have opposed disclosure and argued in favor of it!), from staff (who often continue to demand to know the HIV status of inmates), and from third parties. Perhaps the most compelling disclosure case arises when an inmate, known to be HIV positive, is being released from custody back to a spouse or other sexual partner. If officials have reason to believe the inmate has not and will not tell the partner of the inmate's HIV status, do the officials have a duty to warn the person?

Disclosure of HIV information may also be regulated by state law. For instance, part of a comprehensive state law on AIDS in Washington imposes strict limitations on circumstances under which an individual's HIV status may be disclosed and imposes penalties for improper disclosure.

Isolation/segregation: Under what circumstances may HIV positive inmates legally be isolated from the rest of the population? Doesn't any segregation policy "disclose" the HIV status of inmates?

Treatment: Obviously, there is a fundamental duty to treat the AIDS patient. But is there also a duty to provide AZT or other expensive drugs or treatment modalities (at government expense) which may prolong the life of the offender, but which are not available on demand to members of the general public?

Testing: (Who may be tested? Who must be tested?)

Denial of necessary service or assistance. What liability exposure is created if a staff member refuses to give first aid to a seriously injured inmate out of a fear of contracting AIDS? Training may be critical to reducing the likelihood of this problem occurring.

Americans with Disabilities Act (ADA):

Persons who are HIV positive fit the definition of "disabled" under ADA. Automatically disqualifying persons from programs or automatically segregating them will raise issues under ADA. For instance, caselaw suggests that disqualifying all HIV positive inmates from working food service would violate ADA, *Casey v. Lewis*, 773 Ff. Supp 1365 (D. Ariz.. 1992)

Tuberculosis:

While TB does not present the life-threatening risk or the hysteria of HIV infection, jail inmates are a high risk group for contracting TB. The resurgent threat of TB presents major public health threats to all who live or work in the jail. With those public health threats comes the potential for litigation. What precautions must a jail take to detect TB and prevent its spread to avoid being deliberately indifferent to what is clearly a serious medical need?

The Aging Inmate Population:

Due to a variety of factors, there is, and will continue to be, an increasing number of elderly inmates. Many inmates are physically far older than their chronological age due to drug usage, a lack of health care, personal lifestyle, etc.

Treating the chronic needs of this population will put increasing demands on jail medical resources and, like the AIDS/AZT question, will raise the question of "how much *must* we do for this population, even when society may do less for them when they leave the jail?"

Because of the Eighth Amendment duty to provide some level of medical care, the moral and philosophical questions of how much society should/must spend for the medical needs of the population generally may have to be answered first - through the courts - for inmates.

Abortion and Other Women's Issues:

A court of appeals held, in late 1987, that a New Jersey jail's policy of allowing female inmates to obtain elective abortions only pursuant to court order was unconstitutional. Moreover, the county had the affirmative duty to provide abortion services to all inmates requesting such services. The court didn't require the county to assume the full cost of inmate abortions, but seemed to be saying if the county couldn't find anyone else to pay for the abortion, the county would have to pay for it. [13]

The court reasoned that the county's obligations arose from two sources. First was the Eighth Amendment duty to provide care for serious medical needs (elective abortions were seen as "serious medical needs," the county's policy of not assisting the inmates in obtaining abortions

*13 *Monmouth County Correctional Institution Inmates v. Lanzaro.* 834 F.2d 326 (3rd Cir., 1987).

was "deliberate indifference"). Secondly, the county policy impermissibly interfered with the female inmate's fundamental constitutional right to obtain abortions, guaranteed by previous Supreme Court decisions.

An increasing number of pregnant women enter jails, presenting medical issues dealing with their pregnancies.

Disabled Inmates

Forcing a paraplegic inmate confined in a wheelchair to live for nearly eight months in conditions which made virtually no accommodations for the handicap violated the Eighth Amendment. [14] The court's opinion describes many problems the inmate encountered in using the toilet in his cell and in simply getting to a toilet from where he was assigned to work in the institution.

The lower court had also found the situation (which involved a federal institution) violated the Rehabilitation Act of 1973, 29 USC Sec. 791 et seq. This result was reversed as moot by the appellate court because the inmate had been transferred to another prison and later released altogether during the litigation.

Retrofitting an entire institution to accommodate the disabled could be tremendously expensive. But this case shows that ignoring the needs of a paraplegic inmate can result in liability. Until prisons and jails are fully equipped for the disabled, extraordinary attention probably needs to be paid to the occasional handicapped inmate entering the institution.

While the Eighth Amendment offers some protection for persons suffering from serious disabilities, the Americans With Disabilities Act (ADA) offers far more protection. The ultimate impact of the ADA on correctional operation is yet to be determined;

The adequacy of inmate medical care will remain a concern of the courts since inmates will continue to depend on their custodians as the sole source of medical assistance. Liability in this potentially volatile area is less likely to come from professional medical staff failing to properly perform than from the lack of adequate professional staff or other basic resources and/or from custody staff failing to realize the importance of medical care and somehow preventing inmates from receiving appropriate care. Delaying necessary care for budgetary reasons, while tempting to the financially strapped county jail, can easily become the catalyst for difficult and embarrassing litigation.

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[14] *LaFaut v. Smith*, 834 F.2d 389 (4th Cir., 1987). See also *Bonner v. Arizona Department of Corrections*, 714 F.Supp. 420 (D> Ariz., 1989), holding the provisions of Sec. 504 of the Rehabilitation Act of 1973 (prohibiting discrimination against the handicapped) protected a prison inmate.

XIII. Conditions Of Confinement.

A conditions of confinement lawsuit which claims that some or all of the living conditions in the jail are so bad that they violate the minimal requirements of the Constitution may be **one** of the biggest lawsuits a local jurisdiction may face.

The lawsuit itself, from the service of the Complaint on the defendants, through pretrial discovery, the trial, and formal appeal, can demand large amounts of time and money. Literally thousands of hours of lawyer time may be needed, as well as large amounts of time of those responsible for running the jail.

A county attorney's office may not have the attorney time (or legal expertise) to adequately defend a major conditions case. Experts will need to be hired to review conditions in the jail and to testify at trial. If the case is lost, the County will be required to pay the plaintiffs' attorneys' fees, which can easily reach well into six figures. Various factors (not the least of which is the potential cost of litigating a major conditions case) may create major pressures to settle the case. Yet many jurisdictions have learned the hard way that a hastily drawn settlement agreement , a "consent decree, " can create never-ending problems. In some ways it becomes a greater burden on the County than if the case had been fought through trial and lost.

If the case is lost, the relief phase of the suit may drag on for years, It can involve more court hearings, more attorney fees, a court appointed monitor (paid by the County), and more extraordinary time demands on county staff.

As significant as the time and money consequences of the mechanical parts of the conditions lawsuit can be, they pale in comparison to the suit's potential operational consequences for the jail and the entire county criminal justice system.

For instance, if a court decides that the constitutional deficiencies in the jail are the result of serious overcrowding, the court may impose a population cap on the jail and even require the release of inmates. This in turn may create irresistible pressures to build a new **facility,** with all of the problems that accompany the design, setting, and construction of a new jail. Trying to control jail population may impact police arrest policies, decisions to prosecute, and court decisions on bail and sentencing. Controlling the population of the jail is not a task for the jail administrator alone. Responsibility rests with all those agencies whose decisions affect who goes to jail and how long they stay.

The public may not be interested in what goes on in the jail and gives few accolades to government officials for running a good jail. But a poorly run jail which ignores legal restrictions on how a jail must function creates potentially huge monetary, legal, and operational consequences for the county.

What Are The Issues?

The issues in conditions cases (sometimes referred to as overcrowding cases, although technically levels of crowding are no longer a direct measure of whether a jail meets constitutional requirements) have changed over the years.

The ultimate question is whether the conditions in the jail amount to "cruel and unusual punishment." For pretrial detainees, inmates who have not yet been convicted of a crime, the basic legal question is whether conditions violate the Due Process Clause of the Fourteenth Amendment. The distinction between the requirements of the Eighth Amendment (sentenced offenders) and the Fourteenth Amendment (pretrial offenders) probably exist more in the minds of legal theoreticians and scholars than anywhere else. As a practical matter, there is not a significant difference in conditions cases.

Since 1991, cruel and unusual punishment occurs when conditions are so bad as to amount to the "wanton and unnecessary infliction of pain" and evidence shows the responsible officials (which typically would include the County Commissioners) are "deliberately indifferent" to those bad conditions, *Wilson v. Seiter*, 111 S.Ct. 2321(1991). The requirement that officials be deliberately indifferent to poor conditions was not previously part of the legal equation used to evaluate jail conditions. Prior to the *Wilson* decision, the focus was exclusively on the objective question of "how bad were the conditions," not on a subjective inquiry into the state of mind of the defendant officials. As this paper is written in mid 1993, it is too early to tell what the addition of a state of mind requirement means in conditions litigation. Particularly at the local government level (where the county itself can be sued), many experts doubt that adding the deliberate indifference requirement will have much effect, if any, on whether a court finds a particular facility unconstitutional.

Wilson also made another change from earlier caselaw. Most earlier decisions evaluated the quality of a jail under a "totality of conditions" approach, i.e., all poor conditions (or at least certain categories of conditions) would be considered together, as a totality. In *Wilson*, the Supreme Court said this was improper: "*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets . . . Nothing so amorphous as overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists," 115 L.Ed.2d 271, 283 (emphasis in original).

So the phrase "totality of conditions," so common to those working with conditions cases, now will be of little, if any, importance in conditions cases.

What then are the particular conditions a court will focus on? As *Wilson* indicates, the fundamental question in a conditions case is what the effects on inmates are from deficiencies in the jail's provision of basic human needs. Is the jail adequately providing for these needs, which are been identified in *Wilson* and other cases as including:

Personal safety: What are the levels of violence in the institution? This is one of the most common issues, especially in jails plagued with serious overcrowding, since maintaining adequate safety becomes increasingly difficult as the inmate population goes up, the classification system breaks down and tempers get shorter because of the lack of privacy. While a jail can be double bunked without becoming unconstitutional *per se*, double bunking dramatically increases the potential for increased violence levels, especially where staffing levels are not increased along with the population

Medical Care: Medical care is often the subject of a separate lawsuit, which attacks the health care delivery system alone. As with personal safety, medical care can be comprised to a constitutionally significant extent when population is allowed to increase without some corresponding increase in medical staff and resources.

Food; Do inmates receive a nutritionally adequate diet, prepared and served in a sanitary way? Some dietary issues could be linked to medical services. Other dietary questions may raise First Amendment questions about religion (pork-free diets required by various religious laws), although these would not normally be part of a conditions case.

Shelter: This is a large category, relating to the overall physical environment in the institution. Fire safety is an important issue here, given the tremendous threat to life which can be created where inadequate fire protection exists. Other "shelter" issues can include such diverse areas as heating/cooling/ventilation, lighting, and noise levels. Under the now discredited "totality of conditions" approach, many of these areas might be lumped together. Under ***Wilson,*** joining these areas would be mote difficult.

Exercise: Identified specifically in *Wilson,* the effects of the lack of exercise vary directly with how long the inmate must live without it.

Sanitation: Do the sanitary conditions in the jail threaten the health of the inmates? Does the plumbing work adequately? How clean is the facility, especially showers and bathrooms?

Clothing Seldom an issue anymore, is the clothing adequate for the temperatures in which the inmates will be living, and does it provide adequate privacy?

While it is relatively easy to identify the areas of theoretical concern, it becomes very difficult to decide how bad problems must be in a given area before a court will intervene. That a condition does not comply with a given professional standard does not make it unconstitutional. [15] However, the more a particular condition falls short of a professional standard (such as the Fire Code or recognized public health standards for sanitation), the more likely a court will find a constitutional violation.

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*15 *Bell v. Wolfish.* 441 U.S. 520 (1979).

The plaintiffs will attempt to show (1) that a bad condition exists, (2) inmates have actually suffered from the condition, or (3) harm to inmates is a virtual certainty unless the condition is remedied. Defendants will, of course, try to contest all these factors.

WHERE IS CROWDING?

Note that none of the factors relating to basic human needs speak directly to crowding. In two cases decided in 1979 and 1981, the Supreme court made it clear that there is no "one man - one cell principle lurking" in the Constitution. [16] Instead of counting beds and bodies, a court must evaluate *the effects of poor conditions* on the inmates, said the Court in each of these cases.

Obviously, crowding can be the major factor behind unconstitutional conditions, such as excessively high levels of violence in a jail or a poor medical system. As more and more inmates are packed into a jail, adequately providing for the basic human needs of the inmates become more and more difficult, especially if staffing levels are not increased along with the inmate population.

The medical service delivery system (both staff and physical plant) designed to treat 500 inmates may be incapable of treating 750 - there just isn't enough time and space.

A classification system, intended in part to assure inmate safety, may break down when crowding effectively makes it impossible to move inmates around a jail. As crowding increases, tensions go up, leading to increased violence. One custody officer expected to monitor 24 persons in a housing pod may be incapable of adequately monitoring the same unit when it holds 48 inmates.

Other examples of how key service delivery systems in a seriously overcrowded jail may break down can easily be imagined when they are asked to serve populations perhaps twice as large as they were designed and intended to serve. So while crowding per se may not make a jail unconstitutional, crowding often is the reason a jail is found unconstitutional. when a court decides that (a) conditions in a facility violate the Constitution and (b) crowding is the primary cause of the problems, then the court is free to address crowding issues in its relief order.

Other factors of concern: Various other factors, while not of direct constitutional importance, can work for or against a jail. An overcrowded jail is not necessarily unconstitutional, and factors such as those in the list below can easily make the difference between a crowded jail which will withstand constitutional attack and one which will not.

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*16 Bell, supra,. Rhodes v. Chapman, 101 S. Ct. 2392 (1981).

- Quality of management. Enlightened, innovative, creative, responsive jail management is very important. Not only can good managers often find solutions to problems, they can set a positive tone in the jail which can positively affect relations between staff and inmates. While a court rarely will directly criticize jail management, it is obvious that the quality of management is a major contributor to a good - or bad - jail.

- Management philosophy. What sort of staff-inmate relations does management expect and demand? Is the philosophy a rigid one, or is it flexible enough to respond to the unique situation? Facility design (e.g., direct supervision) can have major impact here.

- Activities and out of cell time. Even where a jail is very crowded, meaningful activities which occupy the inmates' time can mitigate the negative effects of crowding and idleness. The old adage that "idle hands are the devil's plaything" is certainly true in the jail. It therefore is important for the jail to find things which will prevent the inmates' hands from becoming idle. Activities include such things as exercise, classes, programs, library, etc.

- Numbers of staff. Although the Supreme Court said that double celling an institution is not necessarily unconstitutional, one should not read too much into that statement. Allowing a jail's population to increase far beyond its design capacity without increasing the custody and other support staff in the jail invites problems which could be avoided or at least reduced if more staff is present.

- Classification system. Is the classification system able to separate predatory inmates from potential victims?

- Training and supervision of staff. Crowding only increases the stresses on both inmates and staff. A well trained and well supervised staff should be better able to handle this stress and help defuse its potentially negative effects.

Relief - Where The Going Gets Tough

To understand the potential impact of a conditions case, one must understand the immense powers the federal courts have to correct constitutional violations.

Public officials often decry what they believe is the improper and excessive intrusion of the federal court into matters which are none of the court's business. While there are examples of appellate courts reversing lower court relief orders as being too excessive, one must

recognize and yield to the reality that the federal court has tremendous power to enter and enforce orders necessary to remedy constitutional violations.

As perhaps the ultimate example of this power, the Supreme Court has said that as a last resort a district court has the power to order local officials to raise taxes in order to comply with a court order, even though state law may prohibit such action, *Missouri v. Jenkins,* 110 Wt. 1651 (1990). *Jenkins* was a school desegregation case and at issue was a consent decree local officials had voluntarily entered into. However, its rationale could be applied in a corrections case.

Where a court finds cruel and unusual conditions in a jail, the court is empowered to issue an injunction which will require that the offending conditions be corrected by addressing their causes. Federal courts have very broad equitable relief powers --powers to require corrections of constitutional violations. Upon finding a constitutional violation, a court will normally enter an initial relief order which will try to bring the unconstitutional condition or conditions back into minimal compliance with the Constitution in the least intrusive way possible. Typically, a court finding a constitutional violation will order the defendants to develop and present a plan for its cure, leaving as much continuing power and control in the defendants' hands as is reasonably possible.

In its relief orders, the court will address what it believes to be the causes of the constitutional deficiencies. Now the court will directly address overcrowding, if the court believes overcrowding to be the cause of the constitutional violation.

A lack of funds generally will not be accepted by a court as an excuse for not complying with previously entered orders.

An all too common problem in conditions cases is that defendants fail to comply with the court's initial order, which often simply incorporated the defendants' own plan. When this occurs, the court will begin to flex its relief power muscles. The court enters a more demanding order. The sequence of non-compliance followed by more intrusive, demanding orders can continue until the court is satisfied that defendants are complying with the mandates the court has issued.

The startling notion that local officials could be ordered to violate state law has been endorsed by a court in a corrections case. In *Stone v. City and County of San Francisco,* 968 F.2d 865 (9th Cir., 1992). the District Court ordered the sheriff to release inmates who had served 50% of their sentence in order to comply with population caps and to override applicable state laws which would not permit such releases. Although the Court of Appeals reversed this order under the circumstances of the case, it did "not rule out the possibility that such action may be necessary in the future," 968 F.2d at 864. The court said that before an override order could be unposed in the case, the lower court should see if the threat of sanctions (i.e., fines for contempt of court) would result in compliance with the order.

Whatever the effects of *Wilson* v. *Seiter* may be, conditions cases will continue to have a potentially tremendous impact on county jails and, indeed, entire county criminal justice systems. Whenever "basic human need(s)" are found wanting in a condition case in the 1990s. the cause of the deficiency probably will be crowding. Population control will then be the target of the court's relief order.

Jail administrators, other criminal justice officials, and county commissioners must not underestimate what is at risk when a conditions case is filed.

XIV. Consent Decrees

An understanding of major corrections litigation is not complete without a discussion of consent decrees. Literally, a consent decree is simply a means for settling a lawsuit short of a trial and the judge's decision on the merits. It is the parties' *voluntary* agreement as to their future course of conduct in the lawsuit. In the typical jail consent decree, the defendant(s) agree to implement various sorts of changes and improvements in the operation of the jail in return for the plaintiffs (the inmates) giving up various claims and not proceeding to trial.

Once the parties agree to the contents of a consent decree, it is presented to the judge. If the judge is satisfied that the decree is fair, it is approved. At that point, the decree becomes both a contract between the parties and a court order, as binding as though it were entered after a contested trial.

Why then are decrees so controversial? Many of the reasons relate to oversights and errors the defendants themselves make both in the negotiation of the decree and in how they choose to follow (or ignore) its mandates.

1. *What is required?* Defendants may agree to more than they are capable of delivering and/or may not fully understand what they were agreed to. As with any form of business contract, "caveat emptor" - let the buyer (signer) beware. Agreements to lower the population of a jail or to open a new jail on a precise date even before the bond issue passes are things which a jail administrator can't bring about alone. Even the commissioners can't guarantee the results of a bond issue. But this sort of commitment is not uncommon.

   In other situations, a jail administrator may not realize all of what may be required in a very detailed consent decree

2. *Sign it and forget it.* The lawsuit doesn't go away once the decree is signed. But some defendants seem to think it does. In a major conditions suit, the real work only just begins with the signing of the decree. The defendants now have put themselves under court order, often on a tight time schedule, for improvements. Failure to meet the requirements of the decree constitutes a violation of a court order and leaves the defendants in a state of contempt of court and opens them to sanctions (usually fines) and further court orders which the court feels necessary to enforce the original decree.

3. *The decree was years ago*. So what? Unless the decree specifically states how and when its requirements terminate, the decree may run indefinitely.

4. *To detail, or not detail?* In case settlement negotiations, both sides may feel a pressure to develop a decree which is very specific and detailed, as opposed to one which speaks in general terms and principles. The detailed decree is one which is much more capable of being measured and much less subject to be interpreted by the judge in a way which the parties did not intend.

   But the detailed decrees can become absolute. The detail which seemed reasonable when the decree was signed years ago can become a millstone around the neck of the jail, stifling progress and innovation.

   But the Constitution doesn't require . . . Consent decrees often commit the defendants to do more than the Constitution requires. Sometimes this commitment reflects a considered and defensible decision by defendants and their counsel. Other times it is more akin to giving away the farm. But whatever the reason, once the decree is signed by the judge, it, *not the Constitution*, is the yardstick against which jail operations will be measured in those areas of jail operation which the decree addresses.

5. *Well, let's change it.* Change is often the essence of government in the legislative and executive branches. If something doesn't work, if it becomes too costly, if something better comes along, earlier commitments and even county ordinances, can be changed.

But consent decrees cannot be changed so easily, unless the parties can agree to a change (often more difficult than obtaining the settlement in the first place). In 1992, the Supreme Court spoke to the issue of modifying consent decrees. The party seeking the modification must show there has been a "significant change in circumstances (which) warrants revision of the decree," *Rufo v. Inmates of Suffolk County*, 112 S.Ct. 748 (1992). The changes could be in law or in facts. Where the request is based on factual changes, they must "make compliance with the decree substantially more onerous," id. Even where the need for changing a decree is shown, the change must be limited and tailored to the problems which justify a change.

The decision in *Rufo* eased the burden which some courts imposed on parties seeking to amend a consent decree; however, convincing a court to amend a consent decree is likely to continue to be difficult.

Plan Ahead. Despite the horror stories which can be told about never-ending, repressive consent decrees, and judges rigidly enforcing them, a consent decree or some other form of case settlement should be seriously considered in every major case.

Many of the problems described above can be avoided through careful negotiation in which all of the defendants and their counsel work closely together. The decree can specify how and when it will end. It can mitigate some of the nit-picky problems of detail by specifying

that "substantial," not "total" compliance is all that is needed. It doesn't have to be a never-ending and oppressive burden.

Consent decrees will continue to play a major role in jail lawsuits, especially large conditions cases. By understanding both the pitfalls and advantages they can present, defendants can be in a better position to negotiate decrees which are more favorable and flexible than has been the case in many earlier lawsuits.

XV. The Fourteenth Amendment

Due Process and Equal Protection

> " . . . ***nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, " U.S. Constitution, Amendment XIV.***

Due Process

The Fourteenth Amendment is the basis of several, quite different obligations for jail administrators.

Conditions of Confinement and Pretrial Detainees

The adequacy of conditions of confinement of pretrial detainees are judged through the Due Process Clause of the Fourteenth Amendment. Technically, the Eighth Amendment (cruel and unusual punishment) protects only sentenced offenders so a court may not judge conditions for pretrial detainees under the Eighth Amendment. Instead, the Fourteenth Amendment is relied upon. Fourteenth Amendment *Substantive* due process (as the concept is called in this context) and Eighth Amendment cruel and unusual punishment are two legal routes to virtually the same destination. While courts and legal theoreticians discuss the differences between the two concepts, there are no significant differences in the quality of conditions which must be provided pretrial or sentenced inmates.

Prior to *Bell* v. *Wolfish,* some courts said the "presumption of innocence" required more for detainees than the Eighth Amendment demanded for convicted persons. But this distinction was laid to rest in *Bell.*

Due process may then be used to evaluate major conditions cases, but due process also plays a very important role in the day to day operation of a jail. Various types of decisions which take away liberty or property interests from inmates be made in accordance with certain set procedures intended to make the decision process fairer. In contrast to substantive due process, this is known as procedural due process because it focuses on the procedure used to make a particular type of decision, not the final substance of the decision itself.

Inmate Discipline:

Inmate discipline is the most obvious area affected by procedural due process. Since the Supreme Court's 1974 decision in *Wolf v. McDonnell,* 418 U.S. 539 (1974), inmates facing major disciplinary charges are entitled to a hearing with certain other minimal procedural protections as part of the disciplinary process. Among these other rights are a limited right to call witnesses, assistance in certain situations (but no right to legal counsel), an impartial hearing officer or committee, and a written decision which indicates the evidence relied on and the reason for the sanction chosen. The Supreme Court said inmates have no right to confront or cross-examine witnesses against them in disciplinary hearings. This allows for hearing decisions based on information from informants whose identity (and sometimes whose testimony) is not given to the charged inmate. Courts have imposed various procedural protection around the use of informant information, intended to assure the information is reliable.

Staff conducting the hearings must understand what the procedural rules are and how to apply them in a hearing. For instance, what circumstances justify denying an inmate's request that a certain witness be called to testify at a hearing? what sort of a record must be made of that and other decisions in the disciplinary hearing process which are of constitutional dimension?

State Created Liberty Interests

In addition to rules regarding disciplinary hearings, the language of other agency rules and policies can create "liberty interests" protected by due process, even though there is no inherent due process protection with regard to the particular type of decision. For example, rules which say that an inmate will only be put in administrative segregation under certain specified circumstances may trigger limited due process protection, *Hewitt v. Helms*, 459 U.S. 460 (1983).

The concept of "state created liberty interests" is a confusing one. However, it needs to be understood by those who write the rules for such things as denial of visits, program eligibility, administrative segregation, etc. so that due process protections are not created inadvertently or that where they are created, the particular decision process includes whatever due process may be necessary.

Involuntary Medication

More and more mentally ill persons are entering America's jails. These increasing numbers present various management and legal problems for jail administrators. Deliberate indifference to serious mental health needs violates the Eighth Amendment, so the jail has constitutionally mandated treatment obligations. A characteristic of many mentally ill individuals is that they are reluctant to accept treatment. So the jail may face the dilemma that treatment may be necessary and appropriate both in the inmate's interest and in the interest of operating the jail in a safe and humane way, but the inmate refuses treatment, as is his/her constitutional right.

Compounding the treatment/refusal dilemmais a problem faced by many jails in getting access to the traditional mental health treatment system. Many traditional sources of mental health treatment (including involuntary civil commitment) refuse, or are very reluctant, to accept referrals from the jail. This problem between the criminal justice and mental health systems puts pressure on jails to create their own internal mental health treatment system.

A key to such a system may be the ability to override an inmate's refusal to accept treatment. In 1990, the Supreme Court held that the Constitution permits a correctional institution to make this decision without a court order. The court indicated that due process did require an internal admimstrative hearing process which was intended to assure that proper grounds for involuntarily medicating an inmate exists, *Washington v. Harper,* 110 S.Ct. 1028 (1990). A 1992 Supreme Court decision indicates that the *Harper* case probably extends to and includes pretrial detainees, *Riggins v. Nevada,* 112 S.Ct. 1810 (1992). State law may preclude the jail from implementing an involuntary medication program.

Access to the Courts

In a society and government such as ours, which recognizes various individual rights, the individual must have access to the agency or arm of government charged with enforcing those rights. It is one thing to say someone has the right to free speech or to practice their religion, but if the government can prevent someone from exercising those rights and the individual cannot obtain redress for that violation, then the "right" becomes an illusion. The body in our society charged with enforcing rights is the courts.

With these thoughts in mind, the Supreme Court over the years has recognized that while the Constitution doesn't speak specifically of a "right of access to the courts," that right must be an inherent part of the Constitution if that document is to guarantee any rights at all.

For most persons, exercising the right of access to the courts is not difficult and the government doesn't impose insurmountable barriers between the individual and the court system. But when the person is put in prison or jail, there is literally a physical barrier between the inmate and the courts[17]

Over the years the Supreme Court has decided several access to the courts cases involving inmates. The most important came in 1977, when the court said that prisons had the affirmative duty to provide inmates with assistance or resources to allow the inmates to be able to meaningfully exercise their right of access to the courts, *Bounds v. Smith,* 430 U.S. 817 (1977). Specifically, the Court said this meant the institution must provide either lawyers to assist the inmates, or persons trained in the law (such as paralegals or law students), or

•17 But what about appointed counsel for the person charged with a crime? Doesn't that provide access to the courts? Yes, for the criminal case, but what about any civil claim the inmate may wish to bring, such as asserting that he has been beaten, or is not receiving proper medical treatment, or receiving proper medical care? Appointed counsel seldom will represent the inmate in civil cases, since they are not hired to do so. Moreover, once the criminal case is over, the appointed counsel disappears and is never a potential resource for the sentenced offender.

adequate law libraries. The results of Bounds have been extended to jails. An "adequate" law library is quite extensive, expensive, and expansive. One or two shelves of state laws, court rules, and a few out of date legal texts donated by local attorneys over the years is woefully insufficient, yet this describes the law library in many jails.

Many jails try to follow some sort of book request/delivery system, relying on the main county law library. These book paging and delivery systems have almost always been found to be unconstitutional, see *Abdul-Akbar v. Watson*, 775 F. Supp. 735 (D.Del., 1991) and cases cited therein.

Finding space for a complete law library in an existing jail can be difficult, given the amount of shelf space required for the hundreds, if not thousands of books required (a number which keeps growing constantly). Design of a new jail should address the access to the courts and law library issue.

Beyond problems of providing an adequate law library, some courts hold that a library alone cannot provide access to the courts for inmates who cannot read English or who may be intellectually incapable of using a law library. According to one court, a prison system must minimally provide inmates trained in the use of legal materials to assist other inmates, *Knop v. Johnson,* 977 F.2d 996 (6th Cir., 1992).

Equal protection

The Equal Protection Clause of the Fourteenth Amendment demands that groups or individuals similar to one another be treated equally by the government, unless the government can demonstrate sufficient reason for discriminating against one group over another. Historically, the most common equal protection issue is racial segregation. While racial segregation remains a concern, it no longer is the major equal protection issue confronting correctional institutions.

Parity, however is a topic with major implications for facility design. In general, parity cases have condemned the differences in the quality and quantity of programs and facilities which commonly exist between men's and women's institutions. Most courts which have addressed the question have agreed that treating men and women differently must be justified as "serving important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," *McCoy v. Nevada Department of Prisons,* 776 F. Supp. 521 (D. Nev., 1991). The judge in this case noted differences in such areas as educational and vocational programs, and a large number of privileges (women couldn't kiss visitors, men could; women couldn't get candy from visitors, men could, phone access was different; men had better recreation). The court said the defendants had the obligation of justifying those differences.

While parity issues have not been litigated often, the results have been largely the same in parity cases: the government has failed to justify differences which may exist because of everything ranging from intentional discrimination, stereotypes about women (limit their

training to "women's work"), to the fact that men in institutions outnumber women by about 19 to 1, *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich., 1979).

Parity was a "hot" topic in the mid 1980s. but is not often seen in reported decisions today. However, the McCoy case cited above shows the issue is legally still alive and well. The goal of equal programs and facilities should play a strong part in facility planning and design,

While most Fourteenth Amendment questions are primarily operational (such as disciplinary hearings procedures), the issue of equal facilities for women is a major physical plant issue for both new and existing jails. While there may not be many recent reported cases with a "parity" heading, this issue is not likely to go away in the near future.

XVI. Some Final Thoughts

Those who run jails (including the highest officials in county government) are accountable through the federal courts to the Constitution. In many areas, the specific demands of the Constitution are beyond argument. In other areas of jail operation, room for argument remains, depending upon the facts of a case and/or the state of the law.

The requirements of the Constitution are not static. The jail administrator needs to understand the basic principles, but also keep track of changes in the law, by reading and referring to correctional resource material and receiving advice from legal counsel.

From reading these materials, it should be obvious that the evolving legal requirements which overlay operation of a jail only add to the complexity and difficulty of an already difficult task.

Good management and adequate numbers of well trained staff are vital to operating a constitutionaljail. They can save an otherwise poor or crowded jail, and poor management and staff can sink the beat designed facility. For example, the direct supervision jail, with a great deal of direct, face to face staff - inmate contact demands staff with strong "people" skills. These skills were not necessarily as important in older jails, where muscle and intimidation were perhaps of greater need. Potential staff members who apply for work don't necessarily bring these skills with them to the jail - they need training.

Failing to train staff to work in the unique environment of the direct ***supervision jail*** will virtually assure the failure of the jail to operate as it was designed to operate, and put both staff and inmates in danger.

Like every other aspect of government in American society in the waning years of the 20th Century, jail operation is far more complex than it was in years gone by. Recognition of this complexity, including the requirements of running a "legal" jail, is a necessity which cannot be ignored.

Glossary

Hands Off Era - The name commonly given to the period prior to the late 1960s, when courts seldom, if ever, dealt with inmate claims about practices or conditions in prisons of jails.

Hands On Era- Following the hands off era, and beginning in about 1970, this period marked 'a time of dramatically increasing court involvement with correctional issues. It lasted until about 1980. The end of the hands on era was probably marked primarily by the Supreme Court decision in *Bell v. Wolfish*, 441 U.S. 520 (1979).

One Hand Off. One Hand On Era - The period running from 1980 or so until the present, where court involvement with corrections has tapered off somewhat. This period, marked by the leadership of a generally conservative Supreme Court, has seen some rights from the hands on era actually reduced and many other rights consolidated. The growth of new rights has slowed dramatically.

Section 1983 - A shorthand reference to the statute, 42 USC Sec. 1983, which is the legal vehicle by which inmates are able to bring civil rights claims in the federal courts. The law is also sometimes referred to as "the civil rights act," but this can be confusing, since it is actually one of several federal civil rights laws

Attorneys' fees - Pursuant to 42 USC Sec. 1988, the "prevailing party" in a civil rights suit is entitled to an award of attorneys' fees, in addition to whatever relief they obtain in the suit. Fees under Sec. 1988 are typically computed by multiplying the hours the winning lawyer(s) spent on the suit times the typically hourly billing rate for similar lawyers in the community. The result is known as the "lodestar" figure. This figure may be adjusted somewhat, depending on various factors, but is presumptively the amount of the fee award. With billing rates ranging from $100 per hour upward, an attorneys' fees award can involve a considerable amount of money and become a significant aspect in a civil rights case.

Conditions of Confinement - The phrase used to describe lawsuits which claim one or more conditions in a jail or prison amount to cruel and unusual punishment. Often used synonymously with "overcrowding suits," the phrase "conditions of confinement" is the more accurate since the Supreme Court has said that the key question in this type of suit is not how crowded a facility is, but what effect of the conditions in the institution have (or are likely to have) on the inmates. While crowding often is the major contributor to poor conditions, in deciding whether the Constitution has been violated, the court will examine the adequacy of the conditions. If the court finds that one or more conditions do violate the Constitution, the court then has the power to correct the problems which cause the poor conditions and at that point may address crowding.

The conditions which a court will focus upon are those relating to the basic human needs of the inmates, including such things as personal safety, medical care, shelter, sanitation, food, exercise, and clothing. Leading Supreme Court conditions of confinement cases include

Wilson v. Seiter, 111 S.Ct. 2321 (1991), *Bell v. Wolfish,* 441 U.S. 520 (1979), and *Rhodes v. Chapman,* 101 S.Ct. 2392 (1981).

Consent Decree - a form of settling a lawsuit in which the parties typically agree that the defendant will henceforth follow certain new courses of conduct and undertake various improvements (such as reducing jail populations). In return, plaintiffs may drop various claims altogether and reduce others. Once the parties agree, the tentative consent decree is presented to the court for its approval. Once approved, the decree becomes an order of the court, and is enforceable as is any other court order, except as the provisions of the decree itself may define special enforcement mechanisms.

Once entered into, consent decrees are difficult to amend. Unless the decree itself includes an easier standard for amendment, the party seeking to change a decree must show a significant change in factual or legal circumstances which warrants alteration of the decree. Amendments granted must be narrowly tailored to the changed circumstances, *Rufo v. Inmates of Suffolk County* 112 S.Ct. 748 (1992).

Cruel and Unusual Punishment - Conduct or conditions which are prohibited by the Eighth Amendment to the U.S. Constitution: "Excessive bail shall not be required, nor excessive fines impose, nor *cruel and unusual punishments inflicted."* Courts over the years have used various phrases to try to further define the somewhat judgmental concept of "cruel and unusual punishment." Among the phrases they have used are "shock the conscience of the court," and "violate the evolving standards of decency of a civilized society." In the jail context, the courts now ask if the actions of jail officials show the "wanton and unnecessary infliction of pain."

Areas of common concern in Eighth Amendment litigation include use of force, medical care, and overall conditions of confinement.

Deliberate Indifference - A "state of mind" requirement which must be proven in various types of inmate civil rights actions in order for the inmate to win the lawsuit. The phrase first appeared with regard to claims of inadequate medical care, where the Supreme Court said that in order to prove a violation of the Eighth Amendment, the plaintiff must show "deliberate indifference to a serious medical need," *Estelle v. Gamble,* 420 U.S. 97 (1976). The concept also subsequently been applied to claims of inadequate training and to conditions of confinement, among other areas.

The Supreme Court has said that "deliberate indifference" involves conduct which is worse than either negligence or even gross negligence.

Good faith defense - See qualified immunity.

Class Action: A lawsuit brought on behalf of a large number of plaintiff (a "class") with basically similar interests. In jail litigation, class actions are commonly brought on behalf of

all the inmates who are, have been, or may be, in a jail. Class actions avoid a multiplicity of individual claims.

Qualified Immunity: In Section 1983 actions, no damages may be awarded to a plaintiff who establishes that his/her constitutional rights were violated if the right violated was not "clearly established." The defendant must plead that any rights violated were not clearly established. This claim, if successful, is known as "qualified immunity." The qualified immunity defense is sometimes referred to as the "good faith defense," although in subjective good faith of the defendant asserting the defense has little, if any effect on the success or failure of the defense. The qualified immunity defense is not available to municipal corporations.

The *Turner* Test - A means for evaluating whether a jail or prison has validly imposed a restriction on an inmate's exercise of a constitutionally protected right, such as the right to practice his/her religion in some particular way. The reference is to the Supreme Court decision in *Turner v. Safley*, 107 S.Ct. 2254 (1987), in which the Court said that restrictions are valid if they are "reasonably related to a legitimate penological interest." In applying the test, courts will consider four factors:

1. *The relationship between the restriction and a legitimate penological interest, which is most commonly security (although other interests, such as rehabilitation, have also been seen as legitimate).*

2. *Alternative ways the inmate may have for exercising the general right in question. For instance, if the inmate is not permitted to attend a religions service, is the inmate able to practice his/her religion in other ways?*

3. *The impact on staff, inmates, and institution resources if the inmate's request were accommodated.*

4. *Are there other, obvious ways ("'ready alternatives") of accommodating both the inmate's requests and the needs of the institution?*

The *Turner* test is not a difficult one for jail administrators to meet. However, they must recognize when their actions impinge on a constitutionally protected area and carefully evaluate their justifications for those actions.

Selected Cases

The following are summaries of various significant court decisions in correctional law. This represents only a tiny fraction of the total number of major cases the courts have decided over the years which affect the operation of a correctional institution. For example, the Supreme Court has decided well over two dozen cases dealing with correctional issues since 1970.

Bell v. Wolfish

441 U.S. 520 (1979)

One of the most significant cases the Supreme Court has decided in corrections, ***Bell*** dealt with overcrowding and double celling as well as various operational issues. The Court rejected the idea that putting two inmates in a cell designed for one (double-celling) was a per se violation of the Constitution. Instead, the Court indicated the focal point in conditions cases must be the effect of the conditions on inmates: "While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause . ." 99 S.Ct. at 1876.

The Court also rejected standards adopted by various professional associations, such as the American Correctional Association, as being a proper measure of what the Constitution requires. This also reversed a trend among some lower courts to rely on standards (particularly square footage standards) from groups such as the ACA.

Other issues addressed in *Bell* included:

- Publisher only rules: A rule allowing inmates to receive hardback books which came only from a publisher, book club, or bookstore did not violate the First Amendment rights of inmates, given the smuggling problems which could be created if books could enter the institution from any source.

- Strict limits on the numbers of packages inmates could receive were approved. Here the Court sharply criticized the District Court judge for improperly substituting his judgment for that of corrections officials as to what would or would not create a security threat.

- There is no constitutional requirement that inmates be present while correctional officers search their cells.

- A policy of strip searching inmates after returning from contact visits was reasonable and did not violate the Fourth Amendment.

Beyond its immediate results, *Bell* set a new tone and approach for federal court oversight of corrections, once which increased the importance of courts deferring to the legitimate concerns of correctional officials. "But many of these courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations," 99 S.Ct. at 1886.

If the 1970s saw a rising tide of court intervention in corrections, *Bell* marked the high water mark and the beginning of a more moderate era of court oversight.

Block v. Rutherford

104 S.Ct. 3227 (1984)

Pretrial detainees have no constitutional right to contact visits. The Court also reversed the lower court's order allowing inmates to observe searches of their cells. The lower court attempted to justify its ruling, which was in conflict with part of *Bell v. Wolfish*, by resting its decision on a different amendment to the Constitution. The Supreme Court rejected this reasoning, and reaffirmed its result from *Bell* - inmates have no constitutional protected right to be present during cell searches.

Brock v. Warren County

713 F. Supp. 238 (E.D. Tenn., 1989)

This case demonstrates the potential risks ignoring dangerous conditions in a jail can have for both a sheriff and the county. A 63 year old man was placed in a Tennessee jail during a summer hot streak. Temperatures were running between 103 degrees and 110 degrees in the jail. Humidity was very high, in part because inmates would run cold showers to try to reduce the heat somewhat. The nurse recommended that the man be moved to a cooler place, but the sheriff did not respond to this recommendation or take any other steps to cool the jail. Despite previous warnings about excessive heat in the jail and requests from the sheriff for funds to remedy the problem, the county commissioners had refused to authorize expenditure of funds to hook up an air conditioning system (even though ductwork was already in place).

The man began hallucinating one night and eventually collapsed. The single officer on duty felt he could no nothing because he had no assistance. After he collapsed, the man was eventually moved to a cooler area and, after nearly two hours, was taken to a hospital. Suffering from heatstroke, he died in a couple of days.

Evidence showed jail staff had not been given training in emergency medical care or response.

Both the county and the sheriffwere found to have been deliberately indifferent to the inmate's serious health needs as shown by such things as ignoring the general warnings about the excess heat (county), ignoring the specific recommendations from the nurse (the sheriff), and failing

to provide staff with training as to how to respond to medical emergencies (county and sheriff).

The court awarded $100,00 compensatory damages against the sheriff and County jointly and an additional $10,000 in punitive damages against the sheriff (punitive damages may not be awarded against amunicipal corporation). An additional, unspecified attorneys' fee award was approved.

Butler v. Dowd

979 F.2d 661 (8th Cir., 1992)

Several inmates successfully sued a prison warden for a failure to protect the inmates from homosexual rape. Several operational issues combined to support a conclusion that the defendants were deliberately indifferent to conditions in the cell block which resulted in the plaintiffs being raped several times. While the court did not specifically cite the institution's basic physical structure as contributing to the deliberate indifference finding, certain physical attributes of the prison at least made it easier for the rapes to occur without being detected.

Inmates were double-celled in two story, 100 foot long wings. Each wing was controlled from a central bubble where officers could monitor activity in the hallways, but could not see into the cells. Officers did not routinely patrol the wings. Inmates in the cells could communicate with officers in the control area only by shouting to make themselves heard in one of four microphones placed at intervals in the ceiling of each wing. Inmates were allowed to move freely in the wing at various times. During times when inmates were locked in their cells, officers were expected only to verify that two inmates were in a cell, not that the inmates in a cell were the ones assigned to it.

The physical structure of the prison, combined with the operating policies, made it easier for rapes to occur.

Farrar v. Hobby

113 s.Ct. 566 (1992)

Lawyers representing plaintiffs in civil rights cases who win only "nominal damages" ($1.00 or similar token amount) are not entitled to attorneys' fees awards. Many lower courts had approved fee awards in such cases, where the plaintiff won only a token amount, but the lawyer was awarded a fee of potentially thousands of dollars

Gates v. Collier

501 F.2d 1291 (5th Cir., 1975)

One of the earliest cases involving prison conditions and operations to reach a federal appeals court, defendants in this case admitted the Mississippi State Penitentiary at Parchman violated the Constitution. On appeal, they argued they did not have the money to meet the time table for relief set by the court. This claim was rejected by the Court of Appeals.

Housing was described as "unfit for human habitation under any modem concept of decency." Grossly inadequate medical and hygiene conditions threatened the health of inmates.

Inmates were subject to physical punishments, such as being forced to take milk of magnesia, being handcuffed to fences for long periods, and being shot at in order to keep moving or remain standing. Beatings were common.

Most of the internal security was provided by gun carrying inmate trusties who were untrained and largely selected based on favoritism, not merit. These trusties were involved in loan sharking, extortion, and beatings. They often shot other inmates.

There was no classification system (other than racial segregation) and literally no staff control over dormitory living units during the night.

Helling v. McKinney

113 S. Ct. 2475 (1993)

Exposure to second hand cigarette smoke, which may pose a threat of future harm to a prisoner's health, may be cruel and unusual punishment, if the facts of the case point to the jail staff as being deliberately indifferent to the potential health problems caused by the smoke, and the exposure is so high as to create an unreasonable risk of damage to the future health of the inmate.

This case did not hold the inmates have a constitutional right to a smoke free environment, but only that under certain circumstances, exposure to second hand cigarette smoke ***could*** violate the Eighth Amendment.

The case may prove to be more important for its holding that creating risks of future harm to inmates' health can violate the Eighth Amendment than for its specifics about smoking. *Helling* makes it clear that an inmate does not necessarily have to claim he is presently in need of medical care to state an Eighth Amendment claim. *Helling* would appear to be particularly relevant in light of the increasing dangers associated with tuberculosis in jails.

Hudson v. McMillian

112 S.Ct. 995 (1992)

An inmate claiming to have been beaten by officers need not plead and prove a "significant injury" as an absolute condition to stating a claim for an Eighth Amendment violation. While the extent of an injury from a beating is relevant in deciding whether the inmate was subjected 'to cruel and unusual punishment, it was error for the court of appeals to overturn a judgment of $800 in favor of the inmate because the inmate's injuries weren't "significant."

Facts showed an inmate being moved from one part of the institution to another was held by one officer while being punched and kicked by another. A supervisor observed the incident, but did not attempt to intervene.

In all cases alleging an Eighth Amendment violation based on excess force, the plaintiff must show he/she was subjected to the "wanton and unnecessary infliction of pain." In deciding this, the Supreme Court said lower courts should consider five factors:

- The need for force to be used;
- The amount of force actually used,
- The extent of the injuries;
- The threat perceived by reasonable correctional officials; and
- Efforts made by officials to temper the use of force.

Jordan v. Fitzharris

257 F. Supp. 674 (1966)

Conditions in the strip cells at a California prison at Soledad were found to violate the Eighth Amendment. The plaintiff was locked in a strip cell for nearly two weeks. The cell had no interior light and was almost completely dark for all but 15 minutes per day. At best, the inmate was given one shower every five days. The cell had a toilet, flushed twice a day by staff from the outside. No other running water was available and the inmate had no ability to clean himself. A prison doctor suggested he could clean himself with toilet paper and part of the drinking water he was given. The cell walls were covered with waste from prior inmates.

The inmate had no clothes for seven days of his stay. There was no mattress or blanket, only a stiff canvas mat.

The cells were used to house incorrigible inmates, whom the prison authorities felt they could not control in any other way. This was the first major prison case to come before this district court. In finding the conditions unconstitutional, the judge wrote "the responsible prison

authorities . . . have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature," 257 F. Supp. at 680.

Jordan v. Gardner

986 F.2d 1521(9th Cir., 1993), en banc

This was the first federal appeals court decision to evaluate the practice of male correctional officers strip searching female inmates. Overturning a 2-l decision of a panel of the court, the Ninth Circuit held that the practice was cruel and unusual punishment and violated the Eighth Amendment rights of the female inmates. Surprisingly, the court simply refused to discuss whether the searches also violated the Fourth Amendment.

The court based its conclusion on expert testimony which said that many of the inmates, previously abused and victimized by men sexually and/or physically prior to coming to prison, would be psychologically traumatized by being subjected to intensive pat searches which involve touching the breasts and genital areas.

Interestingly, the Ninth Circuit and other courts have approved female officers pat searching male inmate, *Grummett v. Rushen,* 779 F.2d 491(9th Cir., 1985). *Smith v. Fairman,* 678 F.2d 52 (7th Cir., 1982), *Madyun v. Franzen,* 704 F.2d 954 (7th Cir., 1983). The result of these and other cases which address and generally approve female officers supervising male inmates on one hand and the Jordan decision on the other is apparently to create different legal requirements for men supervising women and women supervising men.

Monell v. Department of Social Service

98 S.Ct. 2018 (1978)

Reversing earlier decisions, the Supreme Court here held that municipal corporations (cities, counties, etc.) were "persons" and therefore could be sued under 42 USC Sec. 1983 for both damages and injunctive relief. A state or state agency is not a "person" and cannot be sued directly in Section 1983. Prior to *Monell,* this protection also existed for local governments. Later decisions have held that local governments cannot invoke the "qualified immunity" defense available to individual government officials. This means that any time the government itself (such as the County) violates the constitutional rights of an individual, the government may be held liable for damages, even if the right violated was not "clearly established" when the violation occurred. Municipal corporations cannot be held Liable for punitive damages.

Newman v. Alabama

503 F.2d 1320 (5th Cir., 1974)

Medical conditions in the Alabama prison system were successfully attacked in this case, which was one of a series of decisions which ultimately embraced all conditions throughout the entire state prison system. As a result of these cases, the prison system remained under close supervision of the federal court for years.

There were gross staff shortages in the system, e.g., one prison with nearly 900 inmates received its medical care from one medical technical assistant and inmate assistants.

Unsupervised inmates were providing medical care throughout the system, including doing such things as taking X-rays, giving injections, suturing, and performing minor surgery.

Patients were commonly left unattended for long periods. One inmate was noted as having a wound infested with maggots. Twenty days passed before the wound was cleaned. Another incontinent, geriatric stroke victim was forced to sit on a wooden bench all day so he wouldn't get his bed dirty. He eventually fell off the bench, injuring his leg which was later amputated. He died the day after the amputation.

Pembroke v. WoodCounty

981 F.2d 225 (5th Cir., 1983)

A small Texas jail was sued in 1985 over a variety of poor conditions. Between 1985 and 1988, when the case was tried, most of the problems were corrected. Many of the corrections occurred because of the construction of a new jail, which was planned before the suit was filed. Other improvements were due to a new jail administrator, hired in 1987. A judgment for defendants, both as to damages and injunctive relief, was given by the district court. This case shows that correcting problems even after the suit had been filed can help reduce liability and court intervention.

Redman v. County of San Diego

942 F.2d 1435 (9th Cir., 1991)

This case demonstrates how a "policy" of overcrowding can create liability for the County.

The jail was seriously overcrowded. A series of circumstances led to a young detainee with no prior experience in jail being placed in the same cell with an aggressive homosexual offender awaiting parole revocation. The young inmate was raped several times.

Although the suit could have focused exclusively on the specific decisions which led to the inmates being placed in the same cell, its primary focus turned to the sheriff and the sheriff's

"policies" of crowding the jail and de facto policies concerning the housing of homosexuals. Because of the crowding, homosexuals could not be housed by themselves.

Even though the sheriff knew nothing of the specifics of the incidents which led to the suit, the court felt that a jury could find that the sheriff was deliberately indifferent to the victim-plaintiff's right to personal security (safety) by knowing of the overcrowding and the deficient classification procedures. Thus, the sheriff was found liable.

The County also shared liability because the sheriff was the policy maker for the County, insofar as jail operations were concerned.

Rhodes v. Chapman

101 S.Ct. 2392 (1981)

Reiterating its result in *Bell*, the Supreme Court held that double celling sentenced offenders in a maximum custody prison does not necessarily violate the Eighth Amendment. Opinions of experts as to desirable prison conditions do not mark the boundaries of the Constitution. Conditions must amount to the 'unnecessary and wanton infliction of pain" to violate the Eighth Amendment. The prison in question, which the District Court found unconstitutional, was 38% over its rated capacity. The Supreme Court reversed the lower court, holding that the double celling, when viewed in light of generally adequate services and programs in the institution did not violate the Constitution. With *Rhodes*, it became absolutely clear that crowding per se was not a measure of the constitutional adequacy of a prison or jail.

Sinclair v. Henderson

331 F. Supp. 1123 (E.D. La., 1971)

Sinclair is one of the very earliest cases in which exercise was an issue. Inmates on death row at the Louisiana State Penitentiary in Angola lived in 6' x 9' cells. Sunlight seldom reached the cells. Inmates remained in the cells 23 hours, 45 minutes per day. During the 15 minutes they were out of the cells, they could go down a closed corridor for a shower, to wash their clothes, and to get whatever exercise they could. Inmates remained in these conditions for years and years.

Based on these facts, the court held that the lack of any exercise violated the Eighth Amendment and ordered that the inmates receive at least some outdoor exercise.

From the flagrant facts of *Sinclair*, other courts evolved a more general right to exercise for almost all inmates.

Stone v. San Francisco

968 F.2d 850 (9th Cir., 1992)

This case indicates how far a court may go in ordering relief in a conditions case. San Francisco City and County officials had entered into a consent decree limiting the population of the jail system. Unanticipated population increases made it impossible for the officials to keep the jails within the population limits. After less dramatic measures had failed, the District Court order the sheriffto release inmates upon serving only 50% of their sentence, even though this violated state law.

On appeal, the court said the lower court judge had acted prematurely, and that before ordering the sheriff to take actions in violation of state law, the court should have imposed increasingly large fines for contempt of court as a means of compelling local officials to comply with the consent decree. However, the court of appeals flatly stated that should the contempt fines remedy fail to produce compliance with the order, the lower court could return to ordering the sheriff to release inmates early, in violation of state law.

Turner v. Safley

107 S.Ct. 2254 (1987)

Resolving a conflict among the various circuit courts of appeal, the Supreme Court in Turner set out the basic ground rules which courts should apply in evaluating claims which involve a conflict between the inmate's assertion of a particular right and a competing interest of the institution. A common example of this type of case involves institution restrictions (typically based on security concerns) on an inmate's practice of religion. The inmate might desire to wear special religious medallions which the institution fears could be used as weapons.

The Court said that where an institutional restriction on an inmate's constitutional rights is rationally related to a "legitimate penological interests," the restriction is valid. The 'Turner test," reiterated in the companion case of *O'Lone v. Estate of Shabazz,* 107 S. Ct. 2400 (1987) provide the basis of analyzing many prison cases. The approach embodied in the *Turner* test is more sympathetic to institutional interests than approaches used by many lower courts prior to *Turner* which required a greater showing of institutional need to justify restricting an inmate's rights.

Washington v. Harper

110 S.Ct. 1028 (1990)

Mentally ill inmates who present a danger to themselves or others may be involuntarily medicated without the need of a judicial hearing, according to this 1990 interpretation of the Due Process Clause of the Fourteenth Amendment. The Court approved the due process hearing procedure which the State of Washington Department of Corrections was following

in making the decision to involuntarily medicate inmates. The procedure somewhat resembles an inmate disciplinary hearing, although it is somewhat more complicated.

Wolff v. McDonnell

418 U.S. 539 (1974)

This decision remains the primary source of procedural due process requirements for inmate disciplinary hearings. As interpreted and applied by courts since, *Wolff* imposes the following requirements when inmates are charged with infractions which carry potentially serious penalties, such as loss of good time or extended segregation:

1. *A hearing at which the inmate has a right to be present*

2. *An impartial hearing officer*

3. *Notice of the charges, given to the inmate at least 24 hours before the hearings.*

4. *A tight to call witnesses, unless calling a particular witness would be "unduly hazardous to institutional safety or correctional goals."*

5. *A right to assistance in the hearing where the inmate is illiterate or the issues are particularly complex and it appears the inmate is not capable of collecting and presenting evidence for an adequate comprehension of the case.*

6. *A w&ten decision which states the evidence relied upon and the reasons for the decision.*

The Court specifically said that inmates in disciplinary hearings do not have the right to assistance by legal counsel nor do they have the right to confront or cross-examine witnesses.

Over the years other Supreme Court decisions and many lower court decisions have elaborated on the principles set out in *Wolff* and filled in many of the blanks left in *Wolff.*

Wolff also addressed issues concerning correspondence between attorneys and inmates.

Wilson v. Seiter

111 S.Ct. 2321 (1991)

Wilson is the Supreme Court's third major conditions of confinement case, along with *Bell v. Wolfish,* 441 U.S. 520 (1979) and *Rhodes v. Chapman,* 101 S.Ct. 2392 (1981). Coming a decade after the first tow decisions, *Wilson* is significant for two reasons:

- The Court held that to prove a constitutional violation in a conditions case, defendants must be shown to be deliberately indifferent to the poor conditions, Previous case law focused only on the poor conditions, not the defendants'

subjective state of mind. Now a court must analyze both the effect the conditions have on the inmates (the objective factor) and the defendants' state of mind (the subjective factor).

- The Court said that the "totality of conditions" approach should not be used in conditions cases. Previously, many courts had cumulated various unrelated conditions together (the "totality of conditions") in deciding whether the Constitution was violated. In *Wilson*, the court said that unless conditions "in combination...have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise --for example, a low cell temperature at night combined with a failure to issue blankets," they should not be evaluated in combination with one another.

Resources in Correctional Law

The following is a list of publications which the jail administrator may use to try to stay abreast of developments in area of correctional law. No publication can substitute for advise from an attorney knowledgeable both about the law and the specific facts which may lead to a request for advice. The prices quoted below are believed to be accurate as of 1993, but are obviously subject to change.

Correctional Issues

Correctional Law Reporter - Discusses issues and trends in correctional law as well as reporting on individual cases. Written to be understood by correctional administrators, not just lawyers. Written and edited by attorneys with extensive experience in working with correctional administrators. Published six times per year by Civic Research Institute, Inc., P.O. Box 2316, Kingston, NJ 08528. (609) 722-8471. Cost is $125.00 per year.

Jail and Prison Law Bulletin - Contains summaries of recent decisions from both federal and state courts. Published monthly by Americans for Effective Law Enforcement, 5519 N. Cumberland, #1008, Chicago, IL 60656-1498. (312) 763-2800. Cost is $126.00 per year.

Detention and Corrections Caselaw Catalog, 4th Ed. (1991) Miller, Walter, and Nickerson, CRS Publications, P.O. Box 234, Kents Hill, Maine, 04349. (207)685-9090. A huge collection of summaries of case holdings, broken into 50 major categories. Updated annually. Probably the most comprehensive collection of case holdings in corrections which is available. May be a greater use to a lawyer than a lay person. Cost is $50.00 (softbound) and $80 (hardcover).

Jail Suicide Update-Published quarterly by National Center on Institutions and Alternatives, 40 Lantern Lane, Mansfield, MA 02048. (508) 337-8806. Excellent collection of case holdings plus valuable operations information (model policies, etc.) dealing with suicides in jails. Free.

National Prison Project Journal - Published quarterly by the National Prison Project of the American Civil Liberties Union Foundation, 1875 Connecticut Ave., NW, Washington, D.C. 20009. (202)234-4830. Thoughtful reviews of both specific cases and general issues from the ACLU. Cost is $25.00 per year.

Correctional Law for the Correctional Officer, Collins (1990). Published by the American Correctional Association, 8025 Laurel Lakes Court, Laurel, MD 20707. (301)206-5100. This 135 page monograph reviews basic correctional law. Written for the correctional officer or other correctional practitioner. Useful training tool or general background resource. Price is less than $20.00

A Practical Guide To Inmate Discipline, Collins, (1991). This 55 page monograph reviews the basic constitutional requirements for inmate disciplinary hearings and discusses how those requirements can be understood and successfully applied by hearing officers to produce readily defensible hearing results. Published by the Correctional Law Reporter, P.O. Box 2316, Olympia, WA 98507 (206)754-9205. $15.00.

Recommended Collections For Prison and Other Institution Law Libraries (1990), American Association of Law Libraries, 53 West Jackson Boulevard, Chicago, IL 60604. Cost is $15.00. Recommendations for jail and prison law libraries in this work will normally be followed by courts in law library cases.

Other general materials on corrections administration, which often include material on legal issues, are available from such sources as the **American Jail Association,** 1000 Day Road, Suite 100, Hagerstown, MD 21740, the **American Correctional Association,** 8025 Laurel Lakes Court, Laurel MD, 20707, and the **National Commission on Correctional Health Care,** 2105 N. Southport, Suite 200, Chicago, IL 60614 (312) 528-0818. Another excellent general source of material and referral is the **National Institute of Corrections Information Center,** 1860 Industrial Circle, Suite A, Longmont, Colorado, 80501, l-800-877-1461.

Staff Issues

Legal issues involving staff are increasing in number and complexity. The jail administrator should try to become knowledgeable about issues concerning the Fair Labor Standards Act (which regulates issues such as employee overtime), the Americans With Disabilities Act of 1990, sexual and racial harassment, as well as local civil service rules and requirements from local labor agreements. Some publications dealing with staff issues include:

Fire and Police Personnel Reporter - Published monthly by the Public Safety Personnel Research Institute, 5519 N. Cumberland, #1008, Chicago, IL 60656-1498. (312) 763-5259. Format is similar to Jail and Prison Law Bulletin, except focus is on personnel related issues. Cost is $126.00 per year.

Rights of Law Enforcement Officers (Aitchison, 1990). **The Americans With Disabilities Act,** (Snyder, 1991). **The FLSA, A User's Manual** (Aitchison, 1991). These three books (250 - 450 pages) are all published by Labor Relations Information System, P.O. Box 83068, Portland, OR, 97203 (503) 621-9720. All provide readable, knowledgeable overviews of key areas of law for the public administrator. Prices are in the $20 range.

For areas of law based on federal statute and regulation, the appropriate federal regulatory agency is a source of regulations, interpretations, and other guideline materials. Areas of law included in this category would be the Fair Labor Standards Act (U.S. Department of Labor), the Americans With Disabilities Act (EEOC and the U.S. Department of Justice), and Title VII (sexual, racial harassment and discrimination, EEOC). There are also various looseleaf publications which focus on each of these areas. A major law library should have at least some of these.

ABOUT THE AUTHOR

William C. Collins is generally recognized as one of the country's most experienced and knowledgeable attorneys in the field of correctional law. With over 20 years experience in the area, Mr. Collins has worked closely with legal issues in all phases of corrections, from jails and prisons through probation and parole.

Mr. Collins has published extensively in the field, including two small books of essays on legal issues in corrections as well as articles in various professional journals. He is co-founder and editor of the Correctional Law Reporter, a journal of legal issues written for the correctional administrator.

In recent years, Mr. Collins' work has involved consulting with various correctional agencies across the country, training for state and national organizations on legal issues in corrections, and writing extensively in the area.

Prior to entering private practice in 1985, Mr. Collins worked with the Washington State Attorney General's Office, serving as the first head of that agency's Corrections Division and as de facto chief counsel to virtually every corrections agency in Washington state at one time or another.

While serving as counsel to and later as a member of the Washington State Corrections Standards Board, Mr. Collins assisted in the development of state jail standards and advisory state prison standards in Washington.

Mr. Collins is a graduate of the University of Washington School of Law and also received his Bachelor's degree from the University of Washington.

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